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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~872~~ 399 133

THE UNITED STATES, APPELLANTS,

vs.

OAKES A. AMES & OLIVER AMES 2ND, EXECUTORS OF OAKES AMES, DECEASED, AND PETER BUTLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED AUGUST 11, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 672.

THE UNITED STATES, APPELLANTS,

vs.

OAKES A. AMES & OLIVER AMES 2ND, EXECUTORS OF OAKES AMES, DECEASED, AND PETER BUTLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Bill of complaint	3	1
Demurrers	14 and 15	8
Decree	17	9
Opinion	19	10
Certificate of clerk	27	12

1 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Friday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy-five.

Before the honorable George F. Shepley, circuit judge.

THE UNITED STATES
v.
OAKES A. AMES ET AL. } In equity.

The bill of complaint in this cause was filed in the clerk's office
2 on the tenth day of July, A. D. 1875, and was duly entered at the May term of this court, A. D. 1875, and is in the words and figures following, namely:

3 *Bill of complaint.—Filed July* 10, 1875.

To the judges of the circuit court of the United States for the district of Massachusetts:

The United States of America bring this their bill of complaint against Oakes A. Ames, of Easton, in the county of Bristol, and State of Massachusetts, and Oliver Ames, 2d, of said Easton, both citizens of the State of Massachusetts, as they are executors of the last will and testament of Oakes Ames, late of said Easton, deceased, and against Peter Butler, of Quincy, in the county of Norfolk and State of Massachusetts, and a citizen of the State of Massachusetts, defendants.

And thereupon the complainants say that, on the twenty-third day of March, in the year one thousand eight hundred and sixty-five, they instituted a suit in their then district court for the eastern district of the State of Louisiana, to procure a decree of forfeiture of a steamboat named Rob Roy, and her cargo of eleven hundred and twenty bales of cotton as enemies' property, because said cargo had been sought for, obtained, and brought on board said steamboat from within territory then holden in occupation by armed enemies of your complainants, de-
clared by the President of your complainants to be in a state of
4 insurrection; that at the commencement of said suit your complainants seized said steamboat and said cargo, and their said district court thereafter ordered said cargo of eleven hundred and twenty bales of cotton to be released to A. S. Mansfield, then of the city of New Orleans, in the State of Louisiana, but now of New River, in said last-named State, who appeared in said cause as claimant of said cargo, upon the said claimant, said Mansfield giving a bond to the complainants in the sum of three hundred and fifty thousand dollars with good and solvent security, and, on the twenty-fourth day of March, in the year one thousand eight hundred and sixty-five, in compliance with said order of said court, a bond in said sum of three hundred and fifty thousand dollars was signed, sealed, and delivered in their district court aforesaid, in open court, by the said A. S. Mansfield, claimant, as principal, and by one Thomas H. Barker and one A. F. Cochran, as sureties, accepted by said court as satisfactory, in the sum of one hundred thousand dollars each, and by J. M. Courtenay and A. F. Jones, as sureties, accepted by said court as satisfactory, in the sum of seventy-five thousand dollars each, of which bond, called a release bond, a copy is hereto annexed, marked "A," to be referred to as part of this bill of

complaint; that, in compliance with said order of said court to release said cargo of eleven hundred and twenty bales of cotton upon giving such release-bond, and upon the execution and delivery of the said bond, a writ of release of the said cargo of eleven hundred and twenty bales of cotton issued from their said district court on the twenty-fourth day of March, in the year one thousand eight hundred and sixty-five, and on the next day the marshal of their said district court released the said cargo of eleven hundred and twenty bales of cotton to the said claimant; and, thereafterwards, on the fifth day of May, in the year one thousand eight hundred and sixty-six, their said district court rendered judgment in said cause, signed by the judge of said district court on the tenth day of May, in the year one thousand eight hundred and sixty-six, and ordered, adjudged, and decreed that the libel of your complainants be dismissed, and that the said eleven hundred and twenty bales of cotton, seized as aforesaid, be restored to the said Mansfield, the claimant; that from said judgment and decree in favor of the claimant, the complainants, on the tenth day of May, in the year one
5 thousand eight hundred and sixty-six, appealed to their circuit court in and for the district of Louisiana, and their said circuit court, on the twenty-seventh day of May, in the year one thousand eight hundred and seventy, adjudged and decreed that the judgment aforesaid of the said district court, on the fifth day of May, in the year one thousand eight hundred and sixty-six, be avoided and reversed; and it was further ordered, adjudged, and decreed by said circuit court that said steamer Rob Roy, her tackle, apparel, and cargo, consisting of eleven hundred and twenty bales of cotton, be and the same were thereby condemned as forfeited to the United States, which said last-named decree of the circuit court was signed by the judge of said circuit court on the second day of June, in the year one thousand eight hundred and seventy, a copy of which said decree of the circuit court, signed by the judge on the second day of June, in the year one thousand eight hundred and seventy, is hereto annexed, marked "B," and is to be referred to and taken as part and parcel of this the complainants' bill of complaint; which last-named decree of the circuit court aforesaid is in full force and not annulled, nor reversed, nor appealed from; that on the eighth day of June, in the year one thousand eight hundred and seventy, their aforesaid circuit court rendered a judgment and decree in the aforesaid cause against the aforesaid A. S. Mansfield, claimant, condemning him, the said Mansfield, to pay to the complainants the sum of two hundred and twenty-six thousand nine hundred and forty-six dollars, the value of the said eleven hundred and twenty bales of cotton, seized as aforesaid, weighing, at the time of its release, four hundred and fifty-three thousand nine hundred and eighty-two pounds, at fifty cents per pound, subject to a deduction of twenty-one thousand nine hundred and sixty-three dollars and seventy-two cents for storage, internal revenue and charges of the special supervising agent of the Treasury Department, paid by the said Mansfield, claimant, making the amount of the said judgment to be two hundred and four thousand nine hundred and eighty-two dollars and twenty-eight cents, with five per cent. interest from the twenty-fourth day of March, in the year one thousand eight hundred and sixty-five, until paid, and costs of suit, taxed at one thousand five hundred and sixty-six dollars and eleven cents; and by the said judgment it was further ordered and
6 decreed that the said sureties on the said release-bond be condemned to pay the amount for which they bound themselves; and the said decree was signed by one of the judges of the complain-

ants' said circuit court on the thirteenth day of June, in the year one thousand eight hundred and seventy, a copy of which said last-named judgment and decree is hereto annexed, marked "C," and is to be referred to as part and parcel of this the complainants' bill of complaint; which said last-mentioned decree is in full force, and not reversed, nor annulled, nor appealed from.

And the complainants aver that neither the said claimant, the said Mansfield, nor the said sureties have ever paid to the complainants the aforesaid sum of two hundred and four thousand nine hundred and eighty-two dollars and twenty-eight cents, with five per cent. interest from the twenty-fourth day of March, in the year one thousand eight hundred and sixty-five, and costs of suit, taxed at one thousand five hundred and sixty-six dollars and eleven cents, awarded by the aforesaid final decree of the circuit court aforesaid, nor any part thereof, notwithstanding writs of execution have been duly issued on the said last-mentioned decree against the said Mansfield, claimant, for two hundred and four thousand nine hundred and eighty-two dollars and twenty-eight cents, with five per cent. interest from the twenty-fourth day of March, in the year one thousand eight hundred and sixty-five, until paid, and costs of suit, and also against all the said sureties on the said release-bond for the amounts for which they bound themselves, and the said writs of execution have been duly returned to the clerk's office of the complainants' said circuit court, with returns indorsed thereon by the officers of the complainants, to whom the same were committed for service, that no property, goods, or chattels either of the said Mansfield, or of the said sureties, could be found wherewith to satisfy said executions.

And the complainants are informed and believe, and therefore aver, that long before and at the time of the said seizure of the said steamboat Rob Roy and the said cargo of eleven hundred and twenty bales of cotton, and from thence up to and when their said district court ordered the said cargo of eleven hundred and twenty bales of cotton to be released upon the aforesaid bond being given, and ever afterwards up until long after the time of the rendition of the judgment for the sum of two hundred and four thousand nine hundred and eighty-two dollars and twenty-eight cents, with interest and costs of suit as aforesaid, against said A. S. Mansfield, and also against said sureties, for the sums hereinbefore specified, the said Oakes Ames, the said Butler, and the said A. S. Mansfield were all three copartners, doing business at New Orleans, in the State of Louisiana, and elsewhere, in the purchase and sale of cotton, under the name, firm, and style of A. S. Mansfield; that the said eleven hundred and twenty bales of cotton were purchased by the said copartners for the benefit of the said partnership, and in the course of the business of the said partnership before the said seizure thereof; that the said Oakes Ames and the said Peter Butler well knew of the commencement of the said suit by the complainants to procure a decree of forfeiture of the said steamboat Rob Roy, and her cargo of eleven hundred and twenty bales of cotton, and directed the said Mansfield to give the said release-bond for and in the name and style of their said partnership as obligors, and upon the said bond being executed and delivered by said copartners as obligors, under and by their said partnership name and style by said Mansfield as aforesaid, the said copartners obtained possession of the said eleven hundred and twenty bales of cotton, and sold the same and received the proceeds thereof to their own use as copartners; that the said sum of twenty-one thousand nine hundred and sixty-three dollars and seventy-two cents

7

for storage, internal revenue, and charges of the special supervising agent of the Treasury Department hereinbefore referred to as paid by the said Mansfield, claimant, was paid with funds of the said partnership with full knowledge of all the said copartners; that counsel-fees and the expenses attending the defense of said cause were paid with funds of the said partnership with full knowledge of all of the said copartners.

But the complainants say that at the time of the execution and delivery of said release-bond the complainants had no knowledge nor information whatever that said A. S. Mansfield and said Oakes Ames and said Peter Butler were copartners as aforesaid, nor had the complainants
8 any knowledge or information that the said Oakes Ames, the said A. S. Mansfield, and the said Peter Butler were such copartners until long after said executions had been duly returned to the clerk's office of said circuit court with the returns thereon that no property, goods or chattels of said Mansfield, or of either of said sureties, could be found wherewith to satisfy said executions.

And the complainants aver that there are not sufficient goods or estate belonging to the said partnership wherewith to satisfy the judgment in favor of the complainants for two hundred and four thousand nine hundred and eighty-two dollars and twenty-eight cents, with interest and costs as hereinbefore set forth, and that the said partnership is no longer in existence; that the said Peter Butler has not sufficient goods or estate wherewith to pay and satisfy the judgment in favor of the complainants for two hundred and four thousand nine hundred and eighty-two dollars and twenty-eight cents, with interest and costs as aforesaid.

And the complainants aver that the said Oakes Ames died on the eighth day of May, in the year one thousand eight hundred and seventy-three, and by his last will and testament appointed the said Oakes A. Ames and the said Oliver Ames 2d, executors thereof, and the said Oakes A. Ames and the said Oliver Ames 2d were duly qualified as executors of the said last will and testament of the said Oakes Ames, and now are such executors; that the said Oakes Ames, at the time of his death, left goods and estate belonging to himself more than sufficient to pay and satisfy the judgment in favor of the complainants for two hundred and four thousand nine hundred and eighty-two dollars and twenty-eight cents, with interest and costs as aforesaid; that the estate of the said Oakes Ames, deceased, in the hands of the said Oakes A. Ames and the said Oliver Ames 2d, executors as aforesaid, is insufficient to pay all the debts due from the said Oakes Ames, deceased.

And the complainants insist that they are entitled in equity to have their said claim and demand of two hundred and four thousand nine hundred and eighty-two dollars and twenty-eight cents, with five per cent. interest from the twenty-fourth day of March, in the year one thou-
sand eight hundred and sixty five, and costs of suit, taxed at one
9 thousand five hundred and sixty-six dollars and eleven cents, first paid and satisfied out of the estate of the said Oakes Ames.

And the complainants aver that they have requested the said Oakes A. Ames and the said Oliver Ames 2d, as executors of the last will and testament of the said Oakes Ames, to pay and satisfy the said claim and demand out of the estate of the said Oakes Ames, but that the said Oakes A. Ames and the said Oliver Ames 2d, executors as aforesaid, refuse to comply with such request, pretending that the estate of the said Oakes Ames is not liable to pay or satisfy the same; whereas the complainants charge the contrary to be the truth, and that the estate of the said Oakes Ames is liable in equity to first pay and satisfy the full

amount of said judgment in favor of the complainants for two hundred and four thousand nine hundred and eighty-two dollars and twenty-eight cents, with interest and costs of suit as aforesaid.

Wherefore the complainants pray that the defendants may respectively full, true, direct and perfect answers make, upon oath, according to the best of their respective knowledge, information and belief, to all and singular the matters and charges aforesaid, and that as fully and particularly in every respect, as if the same were here again repeated and they thereunto particularly interrogated.

And that the said Oakes A. Ames and the said Oliver Ames 2d may admit assets of their said testator, Oakes Ames, come to their hand as executors, sufficient to satisfy and pay the aforesaid judgment of two hundred and four thousand nine hundred and eighty-two dollars and twenty-eight cents, recovered by the complainants against said A. S. Mansfield, with interest thereon at five per cent. since the twenty-fourth day of March, in the year one thousand eight hundred and sixty-five, and costs of suit, taxed at one thousand five hundred and sixty-six dollars and eleven cents.

And the complainants pray that the said Oakes A. Ames and the said Oliver Ames 2d, executors as aforesaid, may be compelled, by a decree of this honorable court, to pay to the complainants the said sum of two hundred and four thousand nine hundred and eighty-two dollars and twenty-eight cents, with five per cent. interest thereon from the twenty-fourth day of March, in the year one thousand eight hundred and sixty-five, until paid, and costs of suits, taxed at one thousand five hundred and sixty-six dollars and eleven cents, and before and prior to paying or satisfying any other claim or demand against the estate of the said Oakes Ames; and that the complainants may have such other and further relief as the nature of their case shall require, and as shall be agreeable to equity.

May it please your honors to grant unto the complainants the writ of subpœna issuing out of and under the seal of this honorable court, to be directed to the said Oakes A. Ames and the said Oliver Ames 2d, executors, as aforesaid, and to the said Peter Butler, commanding them, and each of them, by a certain day to be and appear before your honors, and then and there to answer the premises, and further, to stand to and abide such order and decree as shall be agreeable to equity.

THE UNITED STATES OF AMERICA,

By their attorney for the district of Massachusetts,

GEORGE P. SANGER,
U. S. Atty.

GEORGE P. SANGER,
Solicitor and of Counsel.

A.

Release bond.—Filed March 24, 1865.

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

Know all men by these presents that we, Ashael S. Mansfield, of the city of New Orleans, State of Louisiana, claimant and owner of the 1,120 bales cotton, cargo of St'b't Rob Roy libelled herein, as principal, and Thomas H. Barker, in the sum of $100,000, A. F. Jones, in the sum of $75,000, J. M. Courtenay, in the sum of $75,000, and A. F. Cochran, in the sum of $100,000, as sureties, are held and firmly bound unto the

United States of America, libellant, in the sum of ($350,000) three hundred and fifty thousand dollars, lawful money of the United States of America, for the payment whereof to the said United States of America, or assigns, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents.

11 Witness our respective names and seals hereunto affixed by us at New Orleans, this twenty-fourth day of March, one thousand eight hundred and sixty-five.

Whereas an admiralty warrant was lately issued out of the honorable the district court of the United States of America for the earstern district of Louisiana, at the suit of the United States vs. The Steamer Rob Roy, her tackle, apparel, and furniture, and cargo, and numbered 8015 on the docket of said court, commanding the marshal to seize and take into his possession the said st'b't Rob Roy and cargo, which has been seized accordingly, but the cargo of 1,120 bales cotton has been released from said seizure and delivered to A. S. Mansfield, the claimant and owner thereof, by reason of the signing, sealing, and delivery of these presents, said A. S. Mansfield having obtained leave of court to bond said cotton, and filed a claim thereto, which is now of record in the clerk's office of this court:

Now, the condition of the above obligation is such, that if the said claimant and sureties abide by all the orders, interlocutory or final, of the court, and pay the said libellants the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court, then the foregoing obligation to be void; but otherwise shall remain in full force and virtue.

(Signed)	A. S. MANSFIELD.	[L. S.]
"	THOS. A. BARKER.	[L. S.]
"	A. F. JONES.	[L. S.]
"	J. M. COURTENAY.	[L. S.]
"	A. F. COCHRAN.	[L. S.]

Signed, sealed and delivered.
Open court, March 24, 1865. (See minutes.)

[Eighty cents internal-revenue stamp affixed and cancelled.]

12 B.

UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana, April term, A. D. 1870.

NEW ORLEANS, *Friday, twenty-seventh day of May*, 1870.

Court met pursuant to adjournment.

Present, the honorable J. P. Bradley, Asso. Jus. Sup. Ct. U. S.; the honorable W. B. Woods, circuit judge.

UNITED STATES
vs.
STEAMER ROB ROY AND CARGO, CONSISTING of 1,120 b. c. } No. 4083.

For reasons orally assigned by the court, it is ordered, adjudged, and decreed that the judgment rendered by the district court on the 5th May, 1866, be avoided and reversed, and it is now ordered, adjudged,

and decreed by this court that the steamer Rob Roy, her tackle, apparel, and cargo, consisting of 1,120 bales of cotton, be, and the same are hereby, condemned as forfeited to the United States.

Decree rendered May 27, 1870.

Decree signed June 2, 1870.

(Signed) W. B. WOODS, *Judge.*

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand and seal of said court, at the city of New Orleans, this eighth day of October, 1874.

(Signed) F. B. VINOT,
[SEAL] *Deputy Clerk.*

13 C.

UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana, April term, A. D. 1870.

NEW ORLEANS, *Wednesday, eighth day of June*, 1870.

Court met pursuant to adjournment.

Present, the honorable J. P. Bradley, Asso. Jus. Sup. Court U. S.; the honorable W. B. Woods, circuit judge.

UNITED STATES
vs.
STEAMER ROB ROY AND CARGO } No. 4083.

For reasons orally assigned by the court, it is ordered, adjudged, and decreed that the plea in bar filed by the claimant, A. S. Mansfield, be overruled, and that he be condemned to pay to the United States the sum of two hundred and twenty-six thousand nine hundred and forty-six dollars, the value of the cotton seized at the time of its release, weighing 453,892 pounds, at fifty cents per pound, subject to a deduction of the following charges paid by said Mansfield, viz:

Storage	$1,239 63
Internal-revenue tax	9,077 84
Charges S. S. agt. T. D	11,646 25

making the amount of this judgment to be $204,982.29, (two hundred and four thousand nine hundred and eighty-two $\frac{29}{100}$ dollars,) with five per cent. interest from 24th March, 1865, till paid, and costs of suit.

It is further ordered and decreed that the sureties on the re-
14 lease-bond be condemned to pay the amount for which they bound themselves, viz:

A. F. Jones	$75,000
J. M. Courtenay	75,000
A. F. Cochran	100,000
Thomas H. Barker	100,000

And it is further ordered that upon the full amount of this judgment, say $204,982.29, with interest and costs as aforesaid, being deposited in

the registry of the court by either the claimant or the sureties, it shall operate as a full discharge of all parties to the suit.

Decree rendered June 8, 1870.

Decree signed June 13, 1870.

(Signed) W. B. WOODS, *Judge.*

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand and seal of said court, at the city of New Orleans, this eighth day of October, 1874.

[SEAL.] (Signed) F. B. VINOT,
Deputy Clerk.

On the sixth day of September the following demurrer was filed, namely:

Demurrer of Oakes A. Ames and Oliver Ames.—Filed Sept. 6, 1875.

The demurrer of Oakes A. Ames, and Oliver Ames, 2d, defendants to the bill of complaint of the United States of America, plaintiff.

These defendants, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, do demurr to said bill, and for cause of demurrer show that the plaintiff hath not, in and by its said bill, made or stated such a case as entitles it in a court of equity to any discovery from these defendants, or either of them, or to any relief against them, or either of them, as to the matters contained in the said bill on any of such matters. Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto, and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill; and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

OLIVER AMES, 2D,
OAKES A. AMES,
By W. A. MUNROE,
Attorney.

SHATTUCK, HOLMES AND MUNROE,
Solicitors.

I certify that in my opinion the foregoing demurrer is well founded in point of law.

GEO. O. SHATTUCK,
Attorney for Defendant.

I, Oliver Ames, 2d, on oath, depose and say that the foregoing demurrer is not interposed for delay.

OLIVER AMES, 2D.

Subscribed and sworn to this sixth day of September, 1875, at Boston, in the district of Massachusetts.

Before me.

FISHER AMES,
U. S. Commissioner.

On the ninth day of September the following demurrer was filed:

Demurrer of Peter Butler.—Filed Sept. 9, 1875.

The demurrer of Peter Butler, one of the defendants, to said complainant's bill of complaint.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint con-
16 tained to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur in law to the said bill, and for cause of demurrer showeth that the said complainant hath not, by its said bill, made such a case as entitles the complainant, in a court of equity, to any discovery from or against this defendant, as to the matters contained in said bill or any of such matters, and that any discovery which can be made by this defendant touching the matters complained of in said bill, or any of them, cannot be of any avail to the said complainant for any of the purposes for which a discovery is sought against this defendant by the said bill, nor entitle the said complainant to any relief in this court touching any of the matters therein complained of. Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

PETER BUTLER.

A. C. CLARK,
Solicitor.

I, Albe C. Clark, counsel for said defendant Peter Butler, certify that in my opinion the foregoing demurrer is well founded in point of law.

ALBE C. CLARK.

I, Peter Butler, on oath, depose and say that the foregoing demurrer by me subscribed is not interposed for delay.

PETER BUTLER.

Subscribed and sworn to at Boston, in said district, this eighth day of September, 1875.
Before me.

FISHER AMES,
U. S. Commissioner.

This cause was thence continued to this present term, when the same came on to be heard, and was fully heard by the court.

17 On the fourth day of April, A. D. 1876, it is ordered, adjudged, and decreed by the court that the demurrers be sustained, and that the bill of complaint in this cause be and the same is hereby dismissed.

And on the same day the complainants in open court claim an appeal from this decree to the Supreme Court of the United States, which appeal is allowed by the court.
A true record.

JOHN G. STETSON, *Clerk.*

18 The following is a copy of the opinion in accordance with which the decree was entered in this cause, namely:

19 *Opinion of the court.—April 4th*, 1876.

SHEPLEY, J.

Since the decision of the Supreme Court of the United States, in Mason v. Eldred, et al., 6 Wall, 231, overruling Sheehy v. Mandeville, 6 Cranch, 253, the doctrine may be considered as fully settled in all the courts of the highest authority, both in this country and England, that a judgment recovered against one of two partners is a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment. The question is elaborately considered in King v. Hoar, 13 Meeson & Welsby, 495, and the conclusion reached that the original demand had passed in rem judicatam, and could not be made the subject of another action. In Trafton v. The United States, 3 Story, 651, Mr. Justice Story refers to the case of King v. Hoar, as one in which the court of exchequer pronounced what seemed so him a very sound and satisfactory judgment.

20 "No principle" say the court in Smith v. Black, 9 Sergeant & Rawle, 142, "is better settled than that a judgment once rendered absorbs and merges the whole cause of action, and that neither the matter nor the parties can be severed, unless indeed where the cause of action is joint and several, which, certainly, actions against partners are not." To the same effect are the decisions in Robertson v. Smith, 18 Johns., 459; Ward v. Johnson, 13 Mass., 148; Navin v. McNulty, 2 Gilman, 359.

Mr. Justice Field, in Mason v. Eldred, says: "The general doctrine maintained in England and the United States, may be briefly stated. A judgment against one upon a joint contract of several persons, bars an action against the others, though the others were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered, being extinguished, their entire liability is gone. They cannot be sued separately, for they
21 have incurred no several obligation; they cannot be sued jointly with the others, because judgment has already been recovered against the latter, who would otherwise be subjected to two suits for the same cause."

When, therefore, judgment was rendered against Mansfield, the principal, and his sureties on what is described in the decree and record as the "release-bond," which was substituted for the cotton which had been seized and libeled in the district court, the original demand, if it had ever existed against Mansfield, Butler, and Ames, as copartners under the name of A. S. Mansfield, passed in rem judicatam, and if the United States subsequently discovered that Butler and Ames were partners, and might have been joined in the "release-bond," or the judgment rendered upon it, it was too late to proceed afterwards against Butler and Ames, who were never severally liable, and who could not be proceeded against jointly with Mansfield, against whom judgment had already been recovered.

The remedy at law having been lost, the question is then pre-

22 sented whether such a state of facts presents a case which entitles the party to relief in a court of equity. This precise question was answered in the negative by Chancellor Kent, in Penny v. Martin, 4 Johns., ch. 566, and the authority of that eminent jurist, and the force of the reasoning in the opinion in that case would seem to be conclusive upon this point. The omission to make the dormant partners parties in the action at law, arose according to the allegation in the bill in Penny v. Martin, from ignorance of the fact that they were such partners. "Is that ignorance," asks the chancellor, "a sufficient ground for transferring to this court jurisdiction of a matter properly, if not exclusively, cognizable at law? The ignorance might have been removed by due vigilance and inquiry, and perhaps by the assistance of a bill of discovery here. The plaintiffs have no particular equity entitling them to relief. Ignorance, as Lord Loughborough said, is not mistake. They never inquired whether R. and M. had secret partners, and they gave the whole credit to them. If they have now got into embarassment and difficulty, in respect to their legal remedy, by pursuing the osten-
23 sible partners at law, without such inquiry, I do not know of any principle that will authorise this court to take jurisdiction of a case, where the remedy was in the first instance full and adequate at law, because the party may have lost that remedy by ignorance founded on negligence, not on accident or mistake, or on any misrepresentation or fraud."

In the appendix to the brief of the learned counsel for the complainant, the remedial jurisdiction of a court of equity is invoked upon the further ground that after the cotton which had been libeled had been condemned, and after the final process against the stipulator, and his fide jussores had been returned unsatisfied, the complainants were then for the first time informed that Ames and Butler, together with Mansfield, the claimant, had, in the co-partnership capacity, received the proceeds of the cotton that had been seized and condemned, and which had been previously surrendered upon the substitution for it in open court of what the decree of the court called a "release-bond," (which it appears to be in form,) and which the complainants style "a stipulation." This
24 presents the question whether, after the remedy had been exhausted upon the process issued against a principal and his sureties or fide jussores in a bond or stipulation given in an admiralty or prize court, upon the surrender of the res to the claimant, and when that process is returned unsatisfied, the court may resume the possession of the res, or follow the res and the proceeds of its sale in the hands of any party into whose possession it may have passed. I am unable to find any case in which this has been done by an admiralty or prize court. I do not find anywhere that these tribunals, after a decree against the stipulator and his fide jussores, or the principal and sureties on the bond, claim or exercise the right to resume the possession of the res which has been once surrendered upon the entering into the stipulation or filing the release-bond ordered by the court. On the contrary, Dr. Lushington says: "But the effect of taking bail is to release the ship in that action altogether. It would be perfectly absurd to contend that you could arrest a ship, take bail to any amount, and afterwards arrest her again for the same cause of action. The bail represents the ship,
25 and when a ship is once released upon bail, she is altogether released from that action." (The Kalamazoo, 9 Eng. L. & E., 557. See also The Union, 4 Blatch., 90; The White Squall, id., 103.)

Another ground of equitable jurisdiction relied upon is, that the estate of Oakes Ames, in the hands of his executors, is insufficient to

pay all the debts due from the estate, and that the United States are entitled to a priority of payment out of the assets; but that ground fails in this case, there being no priority to be enforced where there is no claim. It follows, as a necessary corollary from the principles above stated, that, admitting all the allegations in the bill to be true, the bill cannot be sustained, and accordingly the demurrer is sustained and the bill dismissed.

23

27 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings (together with the opinion of court) in the cause of The United States v. Oakes A. Ames et al. in this court determined.

In witness whereof I have hereunto subscribed my name and affixed the seal of said circuit court, at Boston, in said district, this twenty-fourth day of June, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundredth.

[SEAL.] JOHN G. STETSON, *Clerk.*

23

(Indorsement on cover:) No. 672. The United States, appellants, vs. Oakes A. Ames & Oliver Ames, 2d, ex'ors of Oakes Ames, dec., & Peter Butler. Massachusetts C. C. U. S. Filed 11th August, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 133.

OCTOBER TERM, 1878.

THE UNITED STATES, APPELLANTS,

v.

OAKES A. AMES AND OLIVER AMES, 2D, EXECUTORS OF THE WILL OF OAKES AMES, DECEASED, AND PETER BUTLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

G. A. SOMERBY,
E. S. MANSFIELD,
Special Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1878. No. 133.

THE UNITED STATES, APPELLANTS,

v.

OAKES A. AMES AND OLIVER AMES, 2D, EXECUTORS OF THE WILL OF OAKES AMES, DECEASED, AND PETER BUTLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The United States, July 10, 1875, filed a bill in equity in the clerk's office of the Circuit Court of the United States for the District of Massachusetts, which was duly entered at the May term, 1875, of that court, and contained the following averments: —

That the United States, March 23, 1865, instituted a suit in their then District Court for the Eastern District of Louisiana, to procure a decree of forfeiture of the steamboat "Rob Roy," and her cargo of eleven hundred and twenty bales of cotton, as enemies' property, because the cotton had been "sought for, obtained and brought on board" the steamboat "from within territory then holden in occupation by armed enemies" of the United States,

"declared by the President of the United States to be in a state of insurrection;"

That at the commencement of the suit the United States seized the steamboat and cotton, and the district court, March 24, 1865, ordered the cotton to be released to A. S. Mansfield, who appeared in the cause as claimant thereof, upon his giving a bond to the United States for $350,000, "with good and solvent security." On the same day the required bond was given, with four sureties, accepted by the court as satisfactory, and on that day the bond was executed and delivered in open court. In compliance with the order of the court, the marshal on the day following released the cotton to the claimant;

That the district court, May 5, 1866, decreed that the libel of the United States be dismissed, and that the cotton be restored to the claimant. From this decree the United States appealed to their Circuit Court for Louisiana, May 10, 1866, and that court, May 27, 1870, reversed the decree of the district court, and decreed that the "Rob Roy" and her cargo be condemned as forfeited to the United States. That decree of forfeiture and condemnation has not been appealed from, and is in full force. The circuit court, June 8, 1870, rendered a judgment and decree "*in the aforesaid cause*" against the claimant, condemning him to pay to the United States $226,946, the value of the cotton, weighing at the time of its release 453,982 pounds, at fifty cents per pound, subject to a deduction of $21,963.72 for storage, internal revenue and charges of the special supervising agent of the treasury department, paid by the claimant, making the amount of the judgment to be $204,-982.28, with five per cent interest from March 24, 1865, until paid, and costs of suit, taxed at $1566.11; and further ordered that the sureties on the release bond be condemned

to pay the amounts for which they bound themselves. That judgment against the claimant and sureties has not been appealed from, and is in full force. Upon that judgment writs of execution have issued against the claimant and sureties, and have been returned *nulla bona*, and the judgment is wholly unsatisfied; (Record, pp. 1–3.)

That "long before, and at the time of the said seizure of the said steamboat 'Rob Roy' and the said cargo of eleven hundred and twenty bales of cotton, and from thence up to and when their said district court ordered the said cargo of eleven hundred and twenty bales of cotton to be released upon the aforesaid bond being given, and ever afterwards up until long after the time of the rendition of the judgment for the sum of two hundred and four thousand nine hundred and eighty-two dollars and twenty-eight cents, with interest and costs of suit as aforesaid, against said A. S. Mansfield, and also against said sureties for the sums hereinbefore specified, the said Oakes Ames, the said Butler and the said A. S. Mansfield were all three copartners, doing business at New Orleans in the State of Louisiana and elsewhere, in the purchase and sale of cotton, under the name, firm and style of A. S. Mansfield; that the said eleven hundred and twenty bales of cotton were purchased by the said copartners for the benefit of the said partnership, and in the course of the business of the said partnership before the said seizure thereof; that the said Oakes Ames and the said Peter Butler well knew of the commencement of the said suit by the complainants to procure a decree of forfeiture of the said steamboat 'Rob Roy' and her cargo of eleven hundred and twenty bales of cotton, and directed the said Mansfield to give the said release bond for and in the name and style of their said partnership as obligors; and upon the said bond being executed and delivered by said

copartners as obligors, under and by their said partnership name and style by said Mansfield as aforesaid, the said copartners obtained possession of the said eleven hundred and twenty bales of cotton, and sold the same and received the proceeds thereof to their own use as copartners; that the said sum of twenty-one thousand nine hundred and sixty-three dollars and seventy-two cents for storage, internal revenue and charges of the Special Supervising Agent of the Treasury Department hereinbefore referred to as paid by the said Mansfield, claimant, was paid with funds of the said partnership with full knowledge of all the said copartners; that counsel fees and the expenses attending the defence of said cause were paid with funds of the said partnership with full knowledge of all the said copartners.

"But the complainants say that at the time of the execution and delivery of said release bond the complainants had no knowledge nor information whatever that said A. S. Mansfield and said Oakes Ames and said Peter Butler were copartners as aforesaid, nor had the complainants any knowledge or information that the said Oakes Ames, the said A. S. Mansfield and the said Peter Butler were such copartners, until long after said executions had been duly returned to the clerk's office of said circuit court, with the returns thereon that no property, goods or chattels of said Mansfield or either of said sureties could be found wherewith to satisfy said executions.

"And the complainants aver that there are not sufficient goods or estate belonging to the said partnership wherewith to satisfy the judgment in favor of the complainants for two hundred and four thousand nine hundred and eighty-two dollars and twenty-eight cents, with interest and costs as hereinbefore set forth, and that the said partnership is no longer in existence; that the said Peter Butler has not suffi-

cient goods or estate wherewith to pay and satisfy the judgment in favor of the complainants for two hundred and four thousand nine hundred and eighty-two dollars and twenty-eight cents, with interest and costs as aforesaid.

"And the complainants aver that the said Oakes Ames died on the eighth day of May in the year one thousand eight hundred and seventy-three, and by his last will and testament appointed the said Oakes A. Ames and the said Oliver Ames, 2d, executors thereof; and the said Oakes A. Ames and the said Oliver Ames, 2d, were duly qualified as executors of the said last will and testament of the said Oakes Ames, and now are such executors; that the said Oakes Ames, at the time of his death, left goods and estate belonging to himself more than sufficient to pay and satisfy the judgment in favor of the complainants for two hundred and four thousand nine hundred and eighty-two dollars and twenty-eight cents, with interest and costs as aforesaid; that the estate of the said Oakes Ames, deceased, in the hands of the said Oakes A. Ames and the said Oliver Ames, 2d, executors as aforesaid, is insufficient to pay all the debts due from the said Oakes Ames, deceased." (Record, pp. 3–5.)

That the United States have requested the executors of the will of Oakes Ames to pay the amount of that judgment out of his estate, and they have refused.

The prayer is for a discovery of assets by the executors of the deceased partner, and for judgment against them for the amount due upon the decree pronounced by the circuit court, June 8, 1870, and for a priority of payment out of his assets in their hands, and for other and further relief.

No decree is asked for against the partner Butler.

The executors demurred to the bill for want of equity.

The defendant Butler demurred for the same reason.

The circuit court sustained the demurrers, and dismissed the bill, April 4, 1876, and on the same day the United States in open court claimed and were allowed an appeal to this court.

ASSIGNMENT OF THE ERROR RELIED UPON BY THE APPELLANTS.

That the decree sustaining the demurrers and dismissing the bill is erroneous.

The opinion of the late learned judge of the court below (Record, pp. 10–12) seems to proceed upon the ground that the United States had obtained a judgment at common law against Mansfield; that such judgment is a bar at law to a subsequent suit against Mansfield's partners, though dormant partners at the time of the contract, and not discovered until after the judgment, and that the original demand had passed *in rem judicatam*, and could not be made the subject of another action; that when "judgment was rendered against Mansfield, the principal, and his sureties, on what is described in the decree and record as the 'release bond,' which was substituted for the cotton which had been seized and libelled in the district court, the original demand, if it had ever existed against Mansfield, Butler and Ames as copartners under the name of A. S. Mansfield, passed *in rem judicatam;* and if the United States subsequently discovered that Butler and Ames were partners, and

might have been joined in the 'release bond,' or the judgment rendered upon it, it was too late to proceed afterwards against Butler and Ames, who were never severally liable, and who could not be proceeded against jointly with Mansfield, against whom judgment had already been recovered." (Opinion of Shepley, J., Record, p. 10.)

In support of this view, the learned judge cited *Mason* v. *Eldred*, 6 Wall. 231; *King* v. *Hoare*, 13 M. & W. 495; *Trafton* v. *The United States*, 3 Story, 651; *Smith* v. *Black*, 9 Serg. & R. 142; *Robertson* v. *Smith*, 18 Johns. 459; *Ward* v. *Johnson*, 13 Mass. 148, and *Wann* v. *McNulty*, 2 Gilm. 359.

In *Mason* v. *Eldred*, 6 Wall. 231, the plaintiff, Mason, sued in the Circuit Court of the United States for Wisconsin, Anson Eldred, Elisha Eldred, and one Balcom, trading as partners, upon a *partnership note* of theirs. Process was served on *Anson* Eldred alone, who alone appeared, and pleaded *non assumpsit*. On the trial, the note being put in evidence by the plaintiff, Eldred offered the record of a judgment in one of the state courts of Michigan, showing that Mason had already brought suit in that court on the same note against the partnership; where, though *Elisha* Eldred was alone served and alone appeared, judgment in form had passed against all the defendants for the full amount due upon the note.

The evidence being objected to by the plaintiff, because not admissible under the pleadings, and because it appeared on the face of the record that there was no judgment against either of the defendants named, except Elisha Eldred, who

alone, as appeared also, was served or appeared, and because it was insufficient to bar the plaintiff's action, the question whether it was evidence under the issue in bar of and to defeat a recovery against Anson Eldred, was certified to this court for decision as one on which the judges of the circuit court were opposed. This court *held* the rule of the *common law* to be that a judgment against one upon a contract merely joint of several persons, bars an action against the others, and that the entire cause of action is merged in the judgment; that this *common-law* rule is altered by statute in Michigan, the statute declaring that a judgment recovered in an action brought against all the copartners shall not merge the liability of the copartners not served with process and not appearing in the action, but that the judgment shall only be evidence of the extent of the plaintiff's demand after their liability is by other evidence established.

In *King* v. *Hoare*, 13 M. & W. 494, the plea to an action of *debt* stated that the contract in the declaration was made by the plaintiff with the defendant and one N. T. Smith, jointly, and not with the defendant alone; and that, in 1843, the plaintiff recovered a judgment against Smith for the same debt with costs, "as appears by the record remaining in the Court of Queen's Bench, which judgment still remains in full force and unreversed;" concluding with the common verification. To this plea there was a demurrer, assigning several special causes, the third special cause being, that it did not aver that the debt was not due from the defendant and Smith *severally* as well as jointly; and the question before the court was, whether the judgment recovered against Smith was a bar in this action against Hoare; and the court *held* that it was.

In *Trafton* v. *The United States*, 3 Story, 646, which was

an action of *assumpsit* for money had and received, where A, being post-master, gave an official bond to the United States, and subsequently employed B as his assistant, and the receipts from the post-office were deposited in their joint names, and an action was brought against A on his bond, and judgment recovered, but he having subsequently become bankrupt, the present action was brought against A and B: it was *held*, that the deposit in the joint names of A and B did not make them jointly responsible; that there was no privity of contract between B and the United States, and that the former judgment against A was a bar to this suit.

Robertson v. *Smith et als.*, 18 Johns. 459, was an action of *assumpsit* against the defendants on two promissory notes made by "Soulden, Smith & Co." The plaintiff, before the commencement of this suit, recovered judgment on each of these notes against *Peter Sken Smith* and *William Soulden*, the ostensible partners under the firm of "Soulden, Smith & Co." In his declarations in those suits he averred them to be partners in trade, and that the notes were made by them in their copartnership name and firm. Not having obtained satisfaction of the judgments, and supposing that *Peter Smith* and *Abraham Van Santvoord* were also partners under the said firm, he brought the present suit against the four defendants. A case was made, by consent, subject to the opinion of the court, on the following question: Can the plaintiff, notwithstanding the judgments already obtained, maintain this action on the same notes, admitting that all the now defendants were partners in the said firm when the notes were made? The court *held* the judgment against two of the defendants to be a bar to the suit brought on the same cause of action against those two, and *Peter*

Smith and *Van Santvoord*, as long as that judgment remained in full force.

Wann et al. v. *McNulty*, 2 Gilm. 355, was an action of *assumpsit* brought by McNulty, the defendant in error, against the plaintiffs in error, who were sued as members of a firm known as the "East Fork Furnace Company." At the first term two of them appeared and pleaded *non assumpsit;* the remaining two were defaulted. At a subsequent term those who had appeared and pleaded made a motion to file an additional plea of a former recovery against one of the firm upon the same cause of action, but the motion was denied. At the trial the defendants offered in evidence, under the general issue, the record of such former recovery, but the court would not permit it to be read to the jury. The appellate court *held*, that the record should have been admitted in evidence under the general issue; that the proper inquiry was, whether the former suit was for the same cause of action, to wit, for the balance due for the lead loaned, and that was the proper subject of proof; that the record should have been admitted if it constituted a bar to the action, and that a judgment against one of the defendants for the balance of the lead loaned to the East Fork Furnace Company (if, in truth, the lead was loaned to that company), constituted a bar to a recovery against the other members of the firm which that company composed.

In *Ward* v. *Johnson et al.*, 13 Mass. 148, the plaintiff declared in *assumpsit*, as the surviving partner of the late firm of *Ward & Warren*, against the defendants, as merchants and copartners in trade under the firm and style of *Henry Johnson*, upon their promissory note, subscribed by the said *Henry* by their said style of partnership, and in their behalf, and payable to the said *Ward & Warren* or

their order. The defendants severally pleaded in bar that, at the Boston Court of Common Pleas, May term, 1814, the said *Ward & Warren* impleaded the said *Henry* severally in an action of trespass on the case, for not performing the same identical promise and undertaking in the declaration mentioned; and such proceedings were had thereon that, at the same term, the said *W. & W.* recovered judgment for their damages and costs; which judgment remains in full force, &c. The appellate court *held* the former judgment to be a bar.

In *Smith et al.* v. *Black*, 9 Serg. & R. 142, Black, the defendant in error, sold certain goods to Nathan Smith, one of the plaintiffs in error, and took his *note*, which he put in suit and prosecuted to judgment, on which he obtained no satisfaction. Afterwards, supposing Newberry Smith, the other plaintiff in error, to be a secret partner, he instituted this action against both, the first count of the declaration being on the *same promissory note*, and the second and third counts being for *goods sold*. The court *held* that the former judgment was a bar to this suit.

These abstracts of each of the cases cited in the opinion of the court below in support of the view that the "remedy at law" (Opinion, Record, p. 10) has been lost, and that "the original demand, if it had ever existed against Mansfield, Butler and Ames as copartners under the name of A. S. Mansfield, passed *in rem judicatam*," are given simply to show the nature of those cases, and the facts upon which well-known principles of common law were applied. They were *all* cases at *common law*, and were actions of *debt* or *assumpsit*, and

the principle of *common law* that applied to them (except in *Mason* v. *Eldred*, where it was decided that a *statute* of Michigan altered the *common law* rule), was precisely the language of this court in *Mason* v. *Eldred; i.e.*, —

"The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons, bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered, being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause."

The opinion of the judge of the court below continues as follows: —

"The remedy at law having been lost, the question is then presented, whether such a state of facts presents a case which entitles the party to relief in a court of equity. This precise question was answered in the negative by Chancellor Kent, in *Penny* v. *Martin*, 4 Johns. Ch. 566; and the authority of that eminent jurist, and the force of the reasoning in the opinion in that case, would seem to be conclusive upon this point. The omission to make the dormant partners parties in the action at law, arose, according to the alle-

gation in the bill in *Penny* v. *Martin*, from ignorance of the fact that they were such partners. 'Is that ignorance,' asks the chancellor, 'a sufficient ground for transferring to this court jurisdiction of a matter properly, if not exclusively, cognizable at law? The ignorance might have been removed by due vigilance and inquiry, and perhaps by the assistance of a bill of discovery here. The plaintiffs have no particular equity entitling them to relief. Ignorance, as Lord Loughborough said, is not mistake. They never inquired whether R. and M. had secret partners, and they gave the whole credit to them. If they have now got into embarrassment and difficulty in respect to their legal remedy, by pursuing the ostensible partners at law without such inquiry, I do not know of any principle that will authorize this court to take jurisdiction of a case where the remedy was, in the first instance, full and adequate at law, because the party may have lost that remedy by ignorance founded on negligence, not on accident or mistake, or on any misrepresentation or fraud.'"

The report of *Penny* v. *Martin* shows what facts were presented in that case, and they were as follows, as stated by the chancellor:

"The facts in this case are few and simple. The plaintiffs sued the defendants, R. and M., as partners in *assumpsit*, at law, and M. only was taken. The suit was carried on, under the provision in the statute, against M., who was taken, and judgment rendered against both R. and M.; and the remedy under it is limited by the statute to an execution against the joint property of both the defendants, and the separate property and person of the one taken. On issuing execution, it was found that there was no joint property, and that M., the defendant taken,

was insolvent. Since that time, the plaintiffs have discovered that the other three defendants in this suit were partners with R and M. in the contract sued at law; and the question is, whether, upon these facts, the plaintiffs are entitled to the aid of this court to recover by its decree their demand against the dormant partners."

The chancellor said, "The demand is on a contract to which it is alleged they were parties, as being dormant partners with R. and M. The omission to make them parties in the action at law, arose, according to the allegation in the bill, from ignorance of the fact that they were such partners. Is that ignorance a sufficient ground for transferring to this court jurisdiction of a matter properly, if not exclusively, cognizable at law? The ignorance might have been removed by due vigilance and inquiry, and perhaps by the assistance of a bill of discovery here. The plaintiffs have no particular equity entitling them to relief. Ignorance, as Lord Loughborough said, is not mistake. They never inquired whether R. and M. had secret partners, and they gave the whole credit to them. If they have now got into embarrassment and difficulty in respect to their legal remedy, by pursuing the ostensible partners at law without such inquiry, I do not know of any principle that will authorize this court to take jurisdiction of a case where the remedy was, in the first instance, full and adequate at law, because the party may have lost that remedy by ignorance founded on negligence, not on accident or mistake, or on any misrepresentation or fraud. Generally speaking, a jurisdiction does not arise here from the mere circumstance that a party has omitted to make a proper case at law. There is no such head of equity jurisdiction. The general rule is, that if the party becomes remediless at law by negligence, he shall not be relieved in equity. He must show that he has been de-

prived of his legal remedy by accident, casualty, misfortune, &c. It is to be observed that here are no special circumstances disclosed by the bill. We have only the naked fact that the plaintiffs discovered, since the judgment at law, that the defendants were partners; but whether they were kept in ignorance by undue means, or took any previous steps to remove it, does not appear, and is not, therefore, to be presumed. Whether they have or have not lost their remedy at law (and on which I give no opinion), the demurrer must be pronounced to be well taken, and the bill dismissed without costs."

It is not proposed to question the soundness of the decision in *Penny* v. *Martin*, and it is difficult to conceive how the chancellor could have rendered a different one upon the facts before him. The question that arose in that case was properly answered, but the facts as averred in the bill in that case, and as stated by the chancellor, were "few and simple," and were wholly different than the facts in the present case. None of the questions that arise in this case were before Chancellor Kent in *Penny* v. *Martin;* and the chancellor was careful to say, "It is to be observed that here are no special circumstances disclosed by the bill. We have only the naked fact that the plaintiffs discovered, since the judgment at law [*i.e.*, in an action of *assumpsit*] that the defendants were partners."

Penny v. *Martin* is the only case cited in the opinion of the court below in support of this portion of it.

The opinion of the judge of the court below then continues as follows: —

"In the appendix to the brief of the learned counsel for the complainant, the remedial jurisdiction of a court of equity is invoked upon the further ground that after the cotton which had been libelled had been condemned, and after the final process against the stipulator, and his *fide jussores* had been returned unsatisfied, the complainants were then for the first time informed that Ames and Butler, together with Mansfield, the claimant, had, in the copartnership capacity, received the proceeds of the cotton that had been seized and condemned, and which had been previously surrendered upon the substitution for it in open court of what the decree of the court called a "release bond" (which it appears to be in form), and which the complainants style "a stipulation." This presents the question whether, after the remedy had been exhausted upon the process issued against a principal and his sureties, or *fide jussores*, in a bond or stipulation given in an admiralty or prize court, upon the surrender of the *res* to the claimant, and when that process is returned unsatisfied, the court may resume the possession of the *res*, or follow the *res* and the proceeds of its sale in the hands of any party into whose possession it may have passed. I am unable to find any case in which this has been done by an admiralty or prize court. I do not find anywhere that these tribunals, after a decree against the stipulator and his *fide jussores*, or the principal and sureties on the bond, claim or exercise the right to resume the possession of the *res* which has been once surrendered upon the entering into the stipulation or filing the release bond ordered by the court. On the contrary, Dr. Lushington says, 'But the effect of taking bail is to release the ship in that action altogether. It would be

perfectly absurd to contend that you could arrest a ship, take bail to any amount, and afterwards arrest her again for the same cause of action. The bail represents the ship, and when a ship is once released upon bail, she is altogether released from that action.' *The Kalamazoo*, 9 Eng. L. & E. 557. See also *The Union*, 4 Blatch. 90; *The White Squall*, id. 103" (Record, p. 11).

The case of *The Kalamazoo*, 9 Eng. L. & E., (s.c.) 15 Jur. 885, was this:

An American ship was arrested, and *bailed*, in a cause of *collision* promoted by the owners of the ship and cargo damaged, and the damage pronounced for. A claim for damage to the cargo was preferred before the registrar and merchants. Subsequently it was ascertained that the damage to the cargo was to a greater extent, and they arrested the ship in a fresh cause of action. The court (Dr. Lushington) *held* that the action could not be maintained, the parties and cause of action being the same.

The case of *The Union*, 4 Blatch. 90, was this:

A libel *in rem* was filed in the District Court of the United States for the Southern District of New York, by the owners of the ship "Charles," against the steamship "Union," for a *collision*, and after the "Union" had been discharged on a stipulation for costs and value, the latter in $4000, the amount claimed in the libel, the libel was amended by claiming $8000, and subsequently a decree was entered in favor of the libellant, for $7834.75, with interest, with a provision that the stipulators pay into the registry the amount of the stipulation; and afterwards the District Court made an order that the claimant redeliver the vessel to the marshal, but that, it being represented that she was beyond his control, he pay into the registry $10,000, part of the

purchase money of the vessel on her sale by him subsequently to her discharge, and that that be taken as a sufficient compliance with the order to redeliver. On appeal to the circuit court, that court (Nelson, J.) *held*, that the order for the redelivery of the vessel, or the payment of the $10,000 into the registry, was erroneous; that the vessel, after being so discharged, returned into the hands of her owner, subject to all previously existing liens or charges, the same as before her seizure, except that on account of which she was seized; and she was also subject to any subsequently accruing liens or charges in the hands of her owner, or in the hands of any person to whom she might be transferred; that a redelivery of the vessel would be one subject to all these existing or subsequently accruing liens, and also to the rights of any *bona fide* purchaser, in case of a sale of her in the mean time; that in this case, the vessel had, after her discharge, been sold and passed into the hands of her purchaser, and his title was undoubted.

The case of *The White Squall*, id. 103, was this:

A libel *in rem* against the vessel was filed in the District Court of the United States for the Southern District of New York, to enforce the payment of a *bottomry bond*, and she was discharged on the usual stipulation for value, and afterwards, during the pendency of the case in the circuit court, on appeal, the respective proctors consented in writing to a return of the vessel into the custody of the marshal, and to her sale by that officer, and she was sold, and an order was obtained from the circuit judge, directing the clerk to enter an order according to such consent: *Held*, on a motion made to vacate such order by a person who claimed to have an interest in the vessel, and who was not a party to the suit, that the judge had no jurisdiction or power to make the order.

It is therefore apparent that *The Kalamazoo* and *The Union* were ordinary admiralty causes of *collision*, and *The White Squall* an admiralty cause to enforce payment of a bottomry bond.

The opinion of the court below concludes as follows: —

"Another ground of equitable jurisdiction relied upon is, that the estate of Oakes Ames in the hands of his executors, is insufficient to pay all the debts due from the estate, and that the United States are entitled to a priority of payment out of the assets; but that ground fails in this case, there being no priority to be enforced where there is no claim. It follows, as a necessary corollary from the principles above stated, that, admitting all the allegations in the bill to be true, the bill cannot be sustained, and accordingly the demurrer is sustained, and the bill dismissed."

It is thus seen, in detail, what the opinion of the court below was, and also the facts and the nature of each of the cases cited in its support.

The opinion may be abbreviated as follows: —

The United States having proceeded at law to judgment on a bond given to them by Mansfield and his sureties, "the original demand, if it had ever existed," against his copartners, passed *in rem judicatam*, and the remedy at law against the partners having been lost, a court of equity will not interfere on the sole ground that the United States have discovered the partners since the judgment at law was rendered; that a court of prize or a court of admiralty do not, after a decree on a stipulation

against the stipulator and his *fide jussores*, and after final process on that decree has been returned unsatisfied, claim or exercise a right to resume possession of the *res* which was surrendered upon the entering into the stipulation; and that the insufficiency of the estate of the deceased partner in the hands of his executors to pay all the debts due from him, does not give the United States a right of priority, because they have no claim.

The counsel for the United States *admit* that a judgment at *common law* against one upon a joint contract of several persons, bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced;

That the plaintiff in the original action at *common law* cannot have relief in a court of equity on the sole ground that since the rendition of the judgment in that action at law, he has discovered that others were dormant partners of the original defendant;

That in an admiralty cause of *collision*, where a vessel has been released upon bail, she cannot be arrested again for the same cause of action;

And that the right of priority does not exist in the United States, if they have no claim within the meaning of the act of congress conferring the right.

I.

The demurrers admitting all the facts averred in the bill to be true, so far as they are well pleaded, if the United States have a right to recover the value of their property which the deceased partner had immediately after its unlivery and the execution of the release bond or stipulation, with knowledge of the entire cause of condemnation and forfeiture, and who, with his copartners, sold it, and received the proceeds of the sale, then his executors are properly proceeded against by this bill, and the circuit court, as a court of equity, has original and plenary jurisdiction.

"The case presented is that of a trust fund, a trustee holding, and a *cestui que trust* claiming it. This gave the circuit court original and plenary jurisdiction. That the fund arose and the trustee was appointed under the bankrupt act, did not affect the right of the United States to pursue both by the exercise of the jurisdiction invoked. The same remedies are applicable as if the fund had arisen and the trustee had been appointed in any other way." *Lewis, Trustee*, v. *The United States*, 92 U.S. 618, p. 622, citing *Beaston* v. *Bank of Delaware*, 12 Pet. 134; *Thompson* v. *Smith*, 2 Wheat. 425.

"In the court of chancery, executors and administrators are considered as trustees, and that court exercises original jurisdiction over them in favor of creditors, legatees and heirs, in reference to the proper execution of the trust. A single creditor has been allowed to sue for his demand in equity, and obtain a decree for payment out of the personal

estate without taking a general account of the testator's debts. *Attorney General* v. *Cornthwaite*, 2 Cox, 43; Adams' Eq. 257. And the existence of this jurisdiction has been acknowledged in this court and in several of the courts of chancery in the states." *Green's Administratrix* v. *Creighton et al.*, 23 How. 90, p. 106.

"That a single creditor may maintain a bill against an administrator of a deceased debtor, for a discovery of assets and the payment of his debt, there can be no doubt." *Hagan* v. *Walker et als.*, 14 How. 29, pp. 34, 35.

In *Hunter* v. *The United States*, 5 Pet. 172, a fund was in the hands of an assignee of an insolvent, out of which the United States asserted a right to a priority of payment; and this court said (pp. 187, 188), "In his capacity as trustee, the government seeks to make Hunter liable. He bears the same relation to the creditors of Smith. It was proper in him, conceiving as he did that the fund in his hands should be paid to these creditors, to resist the claim of the government. Until its right of priority, under all the circumstances of the case, was judicially established, he, in the exercise of his discretion, might withhold the payment. The trustee can only be desirous of making the payment as the law requires. How is this liability to be enforced? What process at law would be adequate to give the relief prayed for in the bill? It is the peculiar province of equity to compel the execution of trusts. . . . No doubt exists, therefore, that a resort to the equity jurisdiction of the circuit court in this case was proper and necessary."

II.

That the United States, upon the averments in this bill, are entitled to the remedy therein prayed for,

or to other and further relief, not inconsistent with the specific prayer, clearly appears from the nature of the original cause against the *Rob Roy and Cargo*, the principles applicable to such cause, and to the averments in the bill.

What was that cause?

Certainly not an action at *common law* in which A recovered judgment against B on a promissory note made by B, and afterwards, discovering that C was a dormant partner of B at the time the note was given, brought an action at common law against C and B.

Certainly not an action of *assumpsit* or *debt* at *common law*.

Certainly *not* an action at *common law*.

Certainly *not* a bill in equity brought by A (after he had recovered judgment in an action at *common law* against B) against C and B, or against C alone; the bill simply setting forth as the sole ground for equitable relief, the naked fact that A did not know C *was B's* partner till after his judgment at law against B had been rendered.

Certainly *not* an admiralty cause of *collision*, where the ship had been released on *bail*. Certainly *not* an admiralty cause to enforce payment of a *bottomry bond*, where the ship had been discharged on the usual stipulation for value.

IT WAS A CAUSE OF FORFEITURE TO THE UNITED STATES OF THE "ROB ROY" AND HER CARGO OF ELEVEN HUNDRED AND

TWENTY BALES OF COTTON AS ENEMIES' PROPERTY, BECAUSE THE CARGO HAD BEEN SOUGHT FOR, OBTAINED AND BROUGHT ON BOARD THE "ROB ROY" FROM WITHIN TERRITORY THEN HOLDEN IN OCCUPATION BY ARMED ENEMIES OF THE UNITED STATES, DECLARED BY THE PRESIDENT OF THE UNITED STATES TO BE IN A STATE OF INSURRECTION (Bill, Record, p. 1; Decree, Record, pp. 6, 7).

"*The government seized the steamer 'Rob Roy' and her cargo as liable to forfeiture for acts done during the war. These acts were in violation of the rules of war, as adopted by the United States. The title of the government rested on such unlawful acts. . . . The government proved the unlawful acts.*"

Mr. Justice Bradley, in *The United States* v. *Rob Roy and Cargo*, 1 Woods' Circ. Ct. 42, p. 44; and in that case (Mr. Justice Bradley, the associate justice of this court, and Mr. Justice Woods, the circuit judge, as judges of the Circuit Court for Louisiana, having pronounced the decree of condemnation of the "Rob Roy" and the 1120 bales of cotton, and having, by the subsequent incidental decree, determined the value of the cotton at the time of its unlivery (Record, pp. 6, 7), Mr. Justice Bradley also said (id. p. 43), "A question still remaining to be decided is, whether the claimant, A. S. Mansfield, is or is not discharged from liability on the bond, by reason of his having received a discharge in bankruptcy. He has pleaded such discharge, dated June 30, 1869, purporting to be a discharge from all debts due by him which existed June 1, 1868, on which day the petition for his adjudication as a bankrupt was filed," and the court *held* that such discharge did not bar the debt due the United States.

"The government seized the steamer 'Rob Roy' and her cargo as liable to forfeiture for acts done during the war. These acts were in violation of the rules of war, as adopted by the United States. The title of the government rested on such unlawful acts."

Are the rights of the United States, after a condemnation, to be measured by and confined to the stipulation or release bond given in such a cause? If they are, then, if the stipulation or release bond proves to be insufficient, and final process thereon is returned wholly unsatisfied, and the proceeds of the property condemned as forfeited to the United States for violation of their rules of war can be traced to the hands of persons NOT *bona fide* purchasers, within the jurisdiction of their courts, the United States and their courts will be powerless to touch those proceeds; their rules of war will, in such cases, be mere nullities, and the very object sought to be accomplished by those rules—the reduction of the enemies of the United States—will be entirely defeated.

Where does it appear that the United States or their courts have agreed to look to the stipulation or release bond in that cause, and no farther, if the purposes of justice should require that the cotton should be retaken while it remained within their jurisdiction, and in the hands of persons NOT *bona fide* purchasers, or if the proceeds of the cotton should remain in the hands of such persons, and

the stipulation or release bond prove to be worthless?

Cotton was the principal source of the enemies' revenue in the late war; and the "Rob Roy's" cargo of 1120 bales of cotton "had been sought for, obtained and brought on board said steamboat from within territory then holden in occupation by armed enemies" of the United States, declared by their president to be in a state of insurrection.

Congress, by act of July 13, 1861, sec. 5 (12 St. at L. 257), made it lawful for the president, by proclamation, to declare the inhabitants of any state, or section of it, where insurrection existed, in a state of insurrection against the United States; "and thereupon all commercial intercourse by and between the same and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said state or section into the other parts of the United States, and all proceeding to such state or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such state or section, be forfeited to the United States."

The Revised Statutes of the United States expressly reserve all rights that accrued prior to the revision.

"The repeal of the several acts embraced in said revision shall not affect any act done, or any right

accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal; but all rights and liabilities under said acts shall continue, and may be enforced in the same manner as if said repeal had not been made; nor shall said repeal in any manner affect the right to any office, or change the term or tenure thereof" (Rev. Stat. U.S. sec. 5597). "All offences committed and all penalties or forfeitures incurred under any statute embraced in said revision prior to said repeal, may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made" (id. sec. 5598).

The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicile of the owner.

Prize Cases, 2 Black, p. 674.

It is immaterial whether the "Rob Roy" and her cargo were condemned as prize of war by a prize court, or for violation of the fifth section of the act of July 13, 1861, by the court of admiralty as an instance court, so far as concerns the effect to be given to the stipulation or release bond. The principles applicable to such a stipulation or release bond given to the United States in such a cause are, of course, the same, whether given in a court of prize, in a cause of prize of war, or in an in-

stance court in a cause of forfeiture for "violation of the rules of war as adopted by the United States."

Such a stipulation, in such a cause, is a mere incident and attendant upon the original cause, and the decree rendered on such a stipulation is not a distinct independent judgment at common law, but is interlocutory, and a mere incident and attendant upon the original cause.

Smart v. *Wolff*, 3 Durn. & East, 323.
The Nied Elwin, 1 Dods. 50.
The Pomona, id. 25.
Roberts on Admiralty and Prize, 434.
Upton's Maritime Warfare and Prize (2d ed.), 432, 433.

Smart v. *Wolff*, *supra*, came before the King's Bench in 1789, the court being then composed of Lord Kenyon, C.J. and Ashhurst, Buller and Grose, JJ. It was a rule for a prohibition to the prize court of the admiralty. The King's Bench *held* that the admiralty court had jurisdiction over the question of freight, claimed by a neutral master against the captor, who had taken the goods as prize. A monition having issued, after the goods were condemned and decreed to be delivered to the captors, at the suit of such master against the plaintiffs as owners or agents of the prize goods, to bring into court *the produce remaining in their hands* to answer the freight, the King's Bench *refused* a prohibition.

Lord Kenyon, Ch. J., said, "These proceedings take their rise from the capture of a Danish by an English ship. The ship and goods were libelled in the admiralty, and several

persons came in as claimants, among whom was the present defendant, who claimed the ship as belonging to a subject of a neutral power. As far as respected Gregory's goods, they were condemned, and no appeal was entered against that sentence. As far as respected the ship itself, she was ordered to be restored, as being the property of a neutral subject. But with regard to the goods of the defendant, they were also condemned; against which an appeal was interposed, and the sentence was confirmed. The court, seeing that the master of the neutral ship had done nothing to forfeit his claim to freight, decreed that it should be paid to him; and this is the constant practice where it does not appear that the neutral has done anything in violation of any treaty or of the *jus gentium*, as by refusing to be searched, or to show his papers, or carrying contraband goods to the enemy, and in a variety of other instances, by which he would forfeit his privilege as a neutral subject. Before this question, however, was decided, on an application to the court of admiralty, the goods were delivered to the party claiming them; but inasmuch as a subsequent demand might be made which it was in the power of that court to determine, they took bail to a certain amount, which has since proved to be insufficient. But it is said that, as soon as the property is thus delivered into the hands of the captors, the court of admiralty has no longer any control over it, and can only proceed against the sureties for the amount of the bail. But that position would be highly inconvenient, and, indeed, would completely shut the doors of justice. For if the admiralty court be then *functus officio*, and the bail be insufficient, what is to become of the freight? . . . The proposition then cannot be maintained, that when the court of admiralty has parted with the possession, it is *functus officio*. . . . While the goods

remain in the warehouses of the admiralty, it is admitted that they may dispose of them according to the exigency of the case; the same rule holds in common-law courts, when they are said to be in *custodia legis;* but when do they cease to be so? Not when they are sent out of their *actual* custody. The jurisdiction of that court attaches *in rem*, and is not altered by *a change of hands.* I lay some stress on the words "change of hands," because, if the *legal property* be altered, as by a sale in market overt, that might vary the case. . . . It seems that it was once doubted whether that court [*i.e.*, the court of admiralty] could take a *fide jussory* caution; and it was contended that, without it, they would have no jurisdiction at all; but that is not warranted. The reason for taking a *fide jussory* caution was to guard against the consequences of delivering the property to foreigners, where that court could not follow it, or to insolvent persons. But that was only an *accumulative remedy*, which enabled the court the better to pursue the property, but did not supersede their jurisdiction *in rem*. . . . In this case, in point of justice, the goods ought not to have been taken out of the hands of the master till he had been satisfied for his freight. And though, in order to accommodate the parties, the possession of the goods was changed, it must be remembered that they were charged in the hands of the party to whom they were delivered, with the same lien as whilst they remained in the admiralty court. . . . The course of these proceedings is by no means novel; it has been repeatedly taken in cases in the prize court where I have sat, and the propriety of it was never questioned."

Ashhurst, J., said, —

"Generally speaking, when a person parts with the possession of a thing on which he has a lien, he parts with the lien itself; but that rule does not hold in cases where by

law he is obliged to deliver up the possession. Now here the goods were in the custody of the law, and were taken out of the custody of the master by the power of the admiralty; but that court may decree him freight and expenses in respect of his lien, notwithstanding the decree of the property to the captors. Had the question merely been whether the plaintiffs here were liable *as bail*, I should have thought that they would not be liable beyond the amount of the sum for which they had become sureties; but that is not the present case; for the monition only requires them to bring in so much of the proceeds of the cargo as remains in their hands. They are not called upon in the characters of bail, but *as having the possession of the proceeds*, by whatever means that may have been obtained. It is highly convenient that the court of admiralty should have that power; and several cases were cited by the advocate-general to show that it had been repeatedly exercised. The cases have great weight, especially as they are consonant to justice and convenience, and there are no authorities to the contrary."

Buller, J., said, "The 2d, 3d, 4th and 5th allegations are that when a ship is delivered to the captor, security is taken to restore her, &c., according to the sentence; that after such delivery the admiralty has no jurisdiction over the party to whom the ship is delivered, unless he is bound by the recognizance; that sureties are not liable beyond the sum taken in the stipulation; and that after payment of such sum the stipulation is discharged, and that any further judgment in the suit is void. Now all these allegations depend on the construction of the 19 Geo. 3, c. 67. But, after the greatest attention which I have been able to give to that act of parliament, I do not think that it *abridges the ancient*

mode of proceeding in the admiralty, or restrains its jurisdiction; but it was passed in order to *give new powers as auxiliary to the authority and justice of the court,* and to expedite the proceedings in it. But these allegations have no relation to the cause before us; for this is not a proceeding against sureties; no question arises on the effect of the stipulation, but the proceeding is merely against the owners or their agents, *in respect of the property in their hands,* and to compel them to bring into court *the goods* over which the court of admiralty has undoubtedly a jurisdiction. This mode of proceeding has been pursued and established by all the cases cited by the counsel against the rule, and there is no authority or even dictum to contradict them. . . . Bail is necessary, because the goods may be sent abroad and out of the power of that court; but as long as they remain within the reach of that court, unless the property be legally changed, they are subject to the control and jurisdiction of the admiralty. The second question is whether, as the court of admiralty has taken a stipulation, it is confined to process on that alone, or may also proceed *in rem* according to its ancient course. I conceive that the two clauses in the statute which apply to that part of the case, are calculated to *advance* and not to *restrain* the power of that court. They give an *additional* remedy for the benefit of the person who may eventually appear to be right, but do not strip him of any remedy which he had before. If the thing itself can be found, the admiralty has a jurisdiction over it, and may compel the production of it to answer the ends and purposes of the decree of that court. . . . For by the proceedings, it appears that there was an attestation that Pearson & Co. were in possession of the *proceeds* of the cargo, and the allegation is that Brymer is one of the company. The monition issued against him as

one of the company agreeably to the attestation; and the allegation is merely to obtain in form that to which the party by his attestation had entitled himself in substance. And it is not denied in any part of the proceedings that Brymer was a partner with Pearson."

Sir William Scott, delivering the judgment of the High Court of Admiralty, in the case of *The Pomona*, 1 Dods. 25, said, "This is an application to the court to enforce a monition against certain persons who have had the proceeds of prize in their hands, knowing them to be such. It is a principle recognized in these as well as the common-law courts, that the proceeds of prize may be followed wherever they can be traced. . . . Where goods have been fairly purchased in market overt, under a total ignorance of their previous history, the captor might find some difficulty in enforcing a process against the purchaser; but here Mr. Smith was aware of the fact; he takes the goods with this responsibility, and he is therefore directly amenable to the court.

"New bills of lading were made out at Jamaica to the order of Smith; he is clearly fixed with the possession of the proceeds, and he assigns them over by his agents to Hunter & Co., by the same title by which he had himself holden them. They have the bills of lading, and take possession of the property with a perfect knowledge of the history attending it. Every particle of the evidence in the cause tends to fix them with the knowledge of their being prize goods. . . . That they had the possession of these goods, is perfectly clear; whether they transferred them again to suit any purposes of their own, is perfectly immaterial. It will not avail them to say that they have not now possession of the proceeds; all the possession that has been had of the goods since, has sprung and arisen from

their possession; the possession of other parties is their possession as derived from them. Whether the parties to whom they transferred the goods received them with a knowledge of the fact that they were prize proceeds, does not appear; if they received them without such knowledge, then, undoubtedly, the captors have done right in passing them by, and in proceeding as they have done against Messrs. Hunter & Co. The captors have made their election, and they had a perfect right so to do. Upon every principle, I think the parties who have been proceeded against, are responsible for the amount of the proceeds; and I shall therefore decree the monition as prayed against Mr. Smith, and also against Messrs. Hunter, Raynie & Co."

Dr. Croke, pronouncing the judgment of the vice-admiralty court at Halifax, in the case of *The Herkimer* (Stewart's Vice-Admiralty Reports, 128, pp. 157, 158), said, "It was laid down expressly by Sir William Scott in Smart and Wolff, that courts of admiralty have generally the power of proceeding to compel the payment of proceeds, as well *by the act of the court, ex officio*, as on the application of the parties interested" (3 T.R. 329). He stated it *arguendo*, indeed, but as a settled incontrovertible doctrine, and which was neither disputed by the opposite counsel, or denied by the court; and as a power which is frequently and notoriously exercised. And, indeed, the courts of admiralty, from their very constitution, must necessarily be invested with such a power. Those courts are the trustees, guardians and protectors of prize on behalf of the public. . . . How many cases may be supposed in which the security of the property might demand the interference of the court, independently of the parties?

Imagine fraudulent contrivances between parties themselves, or, in their absence, amongst their agents, to the injury of captors and claimants themselves, unforeseen circumstances by which proceeds might be endangered, without parties or their agents having it in their power to make application, or not feeling an interest so to do. In these and many other cases which might be conceived, a power of proceeding of its own authority is absolutely necessary to enable the court to execute the solemn trust reposed in it for the security of prize property. This custody, and the want of property in the subject of litigation in the parties [*i.e.*, the *legal property* being in the crown as the representative of the nation] create a great difference between the constitution of courts of admiralty and all other courts. A trust and custody imply the possession of powers to execute them." And on page 163: "The respondent, therefore, stands before the court only as a purchaser, as a mere stranger in possession of the proceeds of prize, and consequently liable to the farther compulsory process of the court in case of non-payment."

Vide Willis v. *Commissioners of Appeals in Prize Causes*, 5 East, 22.

" *Home* v. *Camden*, 2 H. Bl. 533.

In the case of *The Grand Para*, 10 Wheat. 497, this court *held* that where the court of admiralty has parted with the possession of the property, upon bail or stipulation, and it is necessary, for the purposes of justice, to retake the property into the custody of the court, the proper admiralty process against any person not a party to the stipulation, but who is alleged to have the actual or constructive possession, is a *monition*, and not an *execution*, in the first instance.

The case of *The Schooner Lynchburg and Cargo* (Prize Cases, New York, by Blatchford, 1861–65, p. 57), came before Judge Betts in the District Court of the United States for the Southern District of New York, in October, 1861, "a judge whose long experience and exalted reputation as a jurist, give to his opinions the weight of authority," as Mr. Upton says, in his work on "Maritime Warfare and Prize," page 182. The "Lynchburg," with the cargo laden on board of her, having been libelled by the United States and other captors, as prize, and the cargo having been delivered to the claimants on bail before hearing, it afterwards appeared that the cargo had been appraised at less than its real value, and that the security was in too small an amount. A motion was made that the cargo be restored to the custody of the court; but it appearing that it was no longer in the possession of the claimants or the bail, but had passed to *bona fide* purchasers, the court awarded monitions against the claimants to pay into court the difference in amount between the proceeds or value of the cargo delivered to them and the amount of the bail.

Judge Betts said, p. 60, —

"Property seized as prize may be pursued into the hands of all persons who become possessed of it *in rem*, or, if its proceeds are brought into court, by monition. It matters not whether the prize goods remain in kind, or have been disposed of *bona fide*, at private sale, or by auction. The holder of the thing, or of its proceeds, may be compelled, by monition, to deliver the same into court, to be there disposed of according to the rights of the captors (*The Pomona*, 1 Dods. 25; *The Herkimer*, Stewart's Adm. Rep. 128; *The Alligator*, 1 Gall. 148; 1 Wheat. Appendix, 3, 4). And the court may proceed in these cases upon

its own authority, *ex officio*, as well as upon the application of parties, and enforce its decrees against persons having the proceeds of prize in their hands, when insufficient stipulation has been taken on a delivery on bail (1 Wheat. Appendix, 4). . . . Brown Brothers & Co., although not called upon specifically by notice in this motion, or otherwise, therefore come within the scope of the powers which the facts disclosed by the affidavits require the court to exercise, as these claimants are alleged to have had delivered to them the aforesaid 504 bags of coffee, at a valuation in the appraisement below the actual worth of the articles. The libellants are accordingly entitled to sue out monitions against the claimants, C. T. Wortham & Co., or their agent, *and against Brown Brothers & Co.*, to pay into court the difference in amount between the proceeds or value of the bags of coffee delivered to them, respectively, and the sum of the stipulations or bonds given by them, respectively, on such delivery of the coffee to them, respectively, on bail."

Vide McLellan v. *The United States*, 1 Gall. 227, pp. 229, 230.

" *The Struggle*, id. 476, p. 478.

" *Burke* v. *Trevitt*, 1 Mas. 96.

Mr. Chief-Justice Marshall, delivering the opinion of this court in *Hudson* v. *Guestier*, 4 Cr. 293, p. 297, said, —

"Possession of the *res* by the sovereign, has been considered as giving the jurisdiction to his court; the particular mode of introducing the subject into the court, or, in other words, *of instituting the particular process which is preliminary* to the sentence, is properly of municipal regulation, uncontrolled by the law of nations, and therefore is not examinable by a foreign tribunal. It would seem, then, that the *principles* which have been stated as applicable in this

respect to a *prize of war*, may be applied to a vessel rightfully seized for violating the *municipal laws* of a nation, if the sovereign of the captor possesses the same right to maintain his possession against the claim of the original owner in the latter as in the former case."

It follows from the principles established by these cases, that if Oakes Ames was *now alive, and could be found within the territorial jurisdiction of the Circuit Court for the District of Louisiana*, the court that pronounced the decree of forfeiture and determined the value of the cotton at the time of the unlivery, a monition could issue against him from that court to compel *him* to bring in the value of the cotton at the time of the unlivery, *entirely irrespective of the stipulation or release bond;* and that a monition *in personam* could issue from that court against any person or persons found within its territorial jurisdiction, and having the proceeds of the sale of the cotton, *knowing* it to be the property of the United States, to compel them to bring in those proceeds, *entirely irrespective of the stipulation or release bond;* and that if Ames, Butler and Mansfield, as copartners, received the cotton immediately after its unlivery, sold it, and received the proceeds of the sale, each having a perfect knowledge of the entire cause, and having in truth and in fact as copartners paid all the charges of the special supervising agent of the treasury department on the cotton, and having in truth and in fact paid counsel fees, and the ex-

penses attending the defence of the cause, and having directed Mansfield to give the stipulation or release bond for and in the name of the partnership, then not only Mansfield, but also Ames and Butler, could, if they all were alive, and were found within the territorial jurisdiction of that court, have been compelled by a monition *in personam* to bring in the value of the cotton at the time of the unlivery, *entirely irrespective of the stipulation or release bond;* and if the United States *did* suppose and believe that they took the *individual* stipulation or release bond of Mansfield and *his* sureties, and if it *was* so accepted by the court, that was merely an *additional* security, and afforded an *accumulative* remedy, but that *additional* security and the interlocutory decree thereon fixing the value of the cotton at the time of the unlivery, did not in any way strip from the United States their CLAIM *against Ames, Butler and Mansfield, as having had and sold and received the proceeds of the property of the United States, with perfect knowledge at the time of the unlivery, and property condemned for violating the rules of war adopted by the United States.*

It is submitted that there are no authorities to the contrary, and that the United States did, during Oakes Ames' lifetime, have a perfectly valid claim against *him* and his copartners for the value of the cotton at the time of the unlivery, and on the impregnable ground that he and his copartners

had it; that they *had* it and owned it as such co-partners *before* its seizure FOR VIOLATION OF THE RULES OF WAR adopted by the United States; that they had full knowledge of the cause instituted by the United States to forfeit it for violation of those rules of war; that Ames and Butler directed Mansfield to give the stipulation or release bond in the name and style of their partnership (whether he did so or not, is immaterial, because the liability of Ames, Butler and even Mansfield to pay to the United States the value of the cotton at the time of the unlivery, existed during the life of each of them INDEPENDENTLY of the *stipulation* or *release bond*, on the ground of their having in truth and fact *had* the cotton in the way averred in the bill); that upon the stipulation or release bond being executed and delivered (whether Mansfield individually, and *his* sureties, were the only persons bound by the *stipulation* or *release bond*, or not), Ames, Butler and Mansfield, as such copartners, *obtained possession of the cotton, sold it, and received the proceeds as such copartners.*

Now it certainly cannot be that the *death* of either of the copartners has stripped from the United States their CLAIM, and annihilated the *debt* (if it shall be proved) of that deceased partner.

Of course the Circuit Court for *Louisiana* cannot, *by monition in personam*, or by any other process, compel the *executors* of Oakes Ames, or Butler, citizens of Massachusetts, served with process on

this bill in Massachusetts, it being therein averred that Oakes Ames was late of Massachusetts, and that Oakes A. Ames and Oliver Ames, 2d, of Massachusetts, are the executors of his last will and testament, and that Butler is a citizen of Massachusetts, to appear before that court. Of course a personal judgment in that cause against Butler could not be rendered by the Circuit Court for Louisiana unless he had been duly served with a monition within the jurisdiction of that court, if the sole ground of his having had the cotton in the way averred was the cause of the issuance of such monition. So a personal judgment in that cause against Oakes Ames could not be rendered by the Circuit Court for Louisiana, unless he had been duly served with a monition within the jurisdiction of that court, if the sole ground of his having had the cotton in the way averred was the cause of the issuance of such monition.

The cases cited above were cases where the party who was proceeded against on the sole ground of having the proceeds of property condemned as forfeited for violation of rules of war, was *alive*, and the *actual* party who received the proceeds *knowing* them to be such. But in this case, *one* of the parties, one of the partners, has deceased, and his executors, as executors, the capacity in which they are made defendants, hold *all* the estate and property left by him at his decease, and they hold *all* his estate and property subject to this CLAIM of the

United States. As *executors* of the deceased partner, they can be proceeded against in a court of chancery to discover assets of their testator, and to pay valid claims against him. That court is the proper court, and the only court for this purpose, and in that court this bill was filed. *Lewis, Trustee* v. *The United States*, 92 U.S. 618, p. 622; *Green's Administratrix* v. *Creighton et al.*, 23 How. 90, p. 106; *Hagan* v. *Walker et als.*, 14 How. 29, pp. 34, 35, and *Hunter* v. *The United States*, 5 Pet. 172, pp. 187, 188, previously cited, establish this.

The averments are, that there are not sufficient goods or estate belonging to the partnership to pay the value of the cotton at the time the copartners received it; that the partnership is no longer in existence; that Butler has not sufficient goods or estate to pay that value; that final process to obtain that value against Mansfield, and the sureties on the stipulation or release bond, has been returned wholly unsatisfied; that the United States had no knowledge of the partnership until long after the return of *nulla bona* on the process against Mansfield and the sureties on the stipulation or release bond; that Ames died May 8, 1873, leaving goods and estate more than sufficient to pay that value, and that his estate in the hands of his executors is insufficient to pay all his debts.

Although the specific prayer is that the executors be compelled to pay the judicially determined value

of the cotton ($226,946.00, less $21,963.72, for charges of the treasury agent, &c., which the demurrers *admit* were paid with the partnership funds, with full knowledge on the part of each partner), and five per cent interest on that sum, *i.e.*, on $204,982.28, from March 24, 1865 (the day on which the cotton was in fact received by the partners from the marshal's hands, as the demurrers *admit*), and the costs of that cause ($1566.11, the demurrers *admitting* that the cotton was the *property* of the partnership as against every one but the United States, and the law being that each of the partners and all other persons were, so far as concerns the *cotton* and the decree of *condemnation*, represented in court by the *cotton*, the subject of the court's jurisdiction, and the demurrers also *admitting* that Ames and Butler had full knowledge of the entire cause; that they directed Mansfield to give a stipulation or release bond in their partnership name; that the partnership *had* the cotton immediately after the delivery of the stipulation or release bond; that the proceeds of the sale of the cotton were received by Ames, Butler and Mansfield, as copartners; that counsel fees and the expenses of defending the cause were paid with funds of the copartnership, and with full knowledge of each partner), there can be no doubt that a court of equity can grant other and further relief, as asked by the general prayer, not inconsistent with the specific relief prayed

for. Whether the interlocutory decree, determining the value of the cotton, could be received in evidence as against the executors, for the purpose of showing that the value of the cotton had been judicially determined, under all the facts averred in the bill, or whether the United States would be compelled to introduce *other* evidence than that to establish the value of the cotton, is immaterial now. The *amount* of the decree to be rendered against the executors, and the nature of the evidence to establish it, are not properly matters of argument on this demurrer. That the court below can, upon this bill, grant relief not inconsistent with the specific prayer, and consistent with the bill and evidence, or even relief *not* prayed for, consistent with the bill and proofs, is clear.

Watts et al. v. *Waddle et al.*, 6 Pet. 389.
Hobson v. *McArthur*, 16 Pet. 182.
English et al. v. *Foxall*, 2 Pet. 595.
Walden et al. v. *Bodley et al.*, 14 Pet. 156.

III.

The foregoing principles having clearly established that the United States had a *claim* against Ames, Butler and Mansfield, *independently* of the stipulation or release bond, during the life of Ames, we submit that Ames' executors are liable on this claim and this debt in equity, upon another ground; namely, that it is also a partnership debt, and that in the con-

sideration of a court of equity, a partnership debt is *several* as well as joint. The authorities previously cited, show that the *stipulation* (whether the United States and the court took it as Mansfield's individual stipulation or not), and the interlocutory decree rendered thereon, fixing the value of the cotton, and ordering Mansfield to pay that value, and the sureties to pay the amounts for which they respectively bound themselves, did not in any sense change or lessen the liability of *each* of the partners to pay to the United States that value, *independently* of the stipulation; and the United States are entitled to proceed in equity against the estate of the deceased partner, whether the survivors are insolvent or bankrupt, or not.

The doctrine of *merger* certainly has no force in this case, because nothing has been done to *merge* the claim of the United States against Ames and Butler, *on the ground of having had the cotton with perfect knowledge of all the facts.* That claim exists now in full force. So far as *Mansfield* alone is concerned, the value of the cotton has been determined by the interlocutory decree against him and the sureties on the stipulation; and perhaps that value might be proved upon the hearing against the executors of Ames; but it is contradictory to all the authorities, and to every pertinent principle, to say that there has been a *merger* of this CLAIM of the United States, and of this *debt* of the partners Ames and Butler, because the very

nature of the stipulation or release bond that was given, and of the cause itself, make it impossible, and because their obligation to pay exists *independently* of the stipulation.

It is settled that in equity all partnership debts are to be deemed joint and several, and that the joint creditors have in all cases a right to proceed at law (*i.e.*, at *law* as distinguished from equity), "against the survivors, and an election also to proceed in equity against the estate of the deceased partner, whether the survivors be insolvent or bankrupt, or not. The consequence is, that the joint creditors need not now wait until the partnership affairs are wound up, and a final adjustment thereof is made. But they may at once proceed, as upon a joint and several contract, in equity, against the estate of the deceased partner, although in any such suit the surviving partners must be made parties, as persons interested in taking the account."

Story on Partnership, § 362, cited with approval by Mr. Justice Strong, in his opinion in *United States* v. *Lewis*, U.S. Circuit Court, Eastern Dist. Pennsylvania, No. 7, April session, 1875, affirmed by this court, *Lewis, Trustee*, v. *United States*, 92 U.S. 618.

Wilkinson v. *Henderson*, 1 Myl. & K. 582, 588.

Devaynes v. *Noble*, 1 Mer. 529; (s.c.) 2 Russ. & Myl. 495.

Nelson v. *Hill*, 5 How. 127.

Vance v. *Cowing*, 13 Ind. 460.

Freeman v. *Stewart*, 41 Miss. 138. Coll. Part. B. 3, c. 3, § 4, pp. 407–413 (2d ed.).

"In *Nelson* v. *Hill*, 5 How. 127, this court held, that the creditor of a partnership may proceed at law against the surviving partner, or go in the first instance into equity against the representatives of the deceased partner, and that it was not necessary for him to exhaust his remedy at law against the surviving partner, before proceeding in equity against the estate of the deceased. The solvency of the surviving partner is immaterial. To the same effect are *Thorpe* v. *Jackson*, 3 Y. & C. Ex. 653; *Wilkinson* v. *Henderson*, 1 M. &. K. 582; *Ex parte Clegg*, 2 Cox's Cas. 372, and *Camp* v. *Grant*, 21 Conn. 41."

Lewis, Trustee, v. *United States, supra*, pp. 622, 623.

IV.

The defendants Oakes A. Ames and Oliver Ames, 2d, executors of the deceased partner, or the personal representatives of the latter, can take proper measures for recovering what, if anything, shall appear upon the partnership accounts to be due from Butler to the estate of their testator, the deceased partner. These are equities with which the United States have no concern.

Thorpe v. *Jackson*, 2 Y. & Coll. 553.
Devaynes v. *Noble, supra.*
Wilkinson v. *Henderson, supra.*
Sleech's Case, 1 Mer. 539.
Story on Part. § 362.
1 Story, Eq. Jur. § 676.
Lind. on Part. 295, 872.
Rice v. *Gordon*, 11 Beav. 265.
Brown v. *Douglas*, 11 Sim. 283.

Kimball v. *Whitney*, 15 Ind. 280.
Gow. on Part. c. 5, § 2, pp. 358–360 (3d ed.); id. § 3, pp. 290–292.
Danl. Ch. Pr. 269.

V.

The United States are entitled to a priority of payment of their claim against the deceased partner and his debt, out of the assets in the hands of his executors.

The provision of the Revised Statutes, section 3466, is explicit:

"Whenever *any* person indebted to the United States is insolvent, or whenever *the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased*, the debts due to the United States shall be first satisfied," &c.

This court said, in *Beaston* v. *Farmers' Bank of Delaware*, 12 Pet. 102, p. 133, "Whenever he [*i.e.*, the debtor] is thus divested of his property, the person who becomes invested with the title is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property;" citing

United States v. *Fisher*, 2 Cr. 358.
United States v. *Hooe*, 3 Cr. 73.
Prince v. *Bartlett*, 8 Cr. 431.
Conard v. *Atlantic Ins. Co.*, 1 Pet. 439.
Conard v. *Nicoll*, 4 Pet. 308.
Brent v. *Bank of Washington*, 10 Pet. 596.

"All debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included

within the language used in the fifth section of the act of congress;" and *corporations* were held to be *persons* within the act. "As this statute has reference to the public good, it ought to be liberally construed. *United States* v. *Bank of North Carolina*, 6 Pet. 29." *Beaston* v. *Farmers' Bank of Delaware*, *supra*, p. 134.

In *Bayne et al., Trustees*, v. *The United States*, 93 U.S. 642, it was *held*, that a party who obtains from a disbursing officer public moneys without right thereto, and with full knowledge that they are such, becomes *indebted* to the United States, within the meaning of the fifth section of the act of congress of March 3, 1797 (1 Stat. 515), and that in the event of his insolvency the United States is entitled to priority of payment out of his assets. The court said (p. 643), "The law imposes on that firm an obligation, and implies a promise on its part, to refund the money to its owner. Such a promise can be enforced by action. *Assumpsit* will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. *Moses* v. *Macferlan*, 2 Burr. 1012. Bayne & Co. are indebted to the United States, within the meaning of the fifth section of the act of congress of March 3, 1797 (1 Stat. 515). The *form* of their indebtedness, or the mode in which it was incurred, is immaterial. *Lewis, Trustee*, v. *United States*, 92 U.S. 618."

In *The United States* v. *State Bank*, 96 U.S. 30, p. 35, the court said, "A party who, without right and with guilty knowledge, obtains money of the United States from a disbursing officer, becomes indebted to the United States, and they may recover the amount. An action will lie whenever the defendant has received money which is the property of

the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The *form* of the indebtedness, or the mode in which it was incurred, is immaterial."

VI.

The rule in equity, that the private estates of the members of a partnership must first pay the private debts, and the surplus only can be applied to the firm debts, cannot be successfully urged in this case.

(*a*) A claim preferred by an act of congress, absolutely and without qualification, cannot be postponed to the claims of other creditors by force of an equitable maxim not intended to be applicable to the case of a claimant having a superior right by law.

(*b*) That rule in equity is applicable only where the joint estate as well as the private estates of the partners is before the court for distribution, and where there are joint creditors and also separate creditors of the individual partners; and even then all others must yield to that preferred by an absolute law.

That rule in equity was insisted on by the defendants in *United States* v. *Lewis, Trustee,* in the court below, and in *Lewis, Trustee, v. United States, supra,* in this court; and this court said (pp. 624, 625),—

"The court below committed no error in holding that the preference of the United States as a creditor of Cooke, McCulloch & Co., applied to the separate and individual estates of the bankrupt partners, thus superseding the rule

in equity recognized by the bankrupt act, — that partnership property is to be first applied in payment of the individual debts. It is sufficient to say upon this subject that the learned and elaborate argument of the appellant's counsel in support of the opposite view overlooks the true meaning and effect of the statutes. The bankrupt parties in question were indebted to the United States, and they had separate estates. This entitled the United States to the preference claimed. One of the obvious purposes of the fifth section of the act of 1797, was to abrogate the rule insisted upon, and it has clearly done so. The provisions of the bankrupt act relied upon do not, as we have shown, affect the United States. The legal relations of those parties to the United States in this controversy are just what they would have been if those parties were individual debtors to the United States, and the firm of Cooke, McCulloch & Co. had never existed. The separate and individual interest of the several partners in the partnership property of Jay Cooke & Co. can be only the share of each one of what may be left after discharging all the liabilities of the copartnership. This will be nothing, the firm being in bankruptcy, and conceded to be hopelessly insolvent. The United States can, therefore, have no interest with respect to the administration of its affairs."

VII.

Cases similar to *The United States* v. *Price*, 9 How. 83, have no analogy to the present case. The court said in that case (p. 91),—

"The question for our consideration will, therefore, be whether a court of equity will interfere to give a remedy against the personal assets of a deceased

surety, when the remedy *at law* has been lost by the election of the obligee to take a *joint* judgment on a joint and several obligation.

"The obligation of *suretyship* arises only from positive *contract*. This contract is construed strictly both at law and equity, and the liability of the surety cannot be extended by implication beyond the terms of the *contract*."

But this bill is *not* against the executors of a deceased *surety* on a bond given for duties; it is *not* against the executors of a deceased *surety* on the stipulation or release bond given to obtain the cotton which has been condemned to the United States for violating their rules of war.

Neither do the cases of *The Steamer Webb*, 14 Wall. 406, and *The Ann Caroline*, 2 Wall. 538, afford any analogy to this case; the decisions in those cases being that sureties on stipulations for a discharge of a vessel libelled in an admiralty cause of collision or damage cannot be held for a greater sum than which they are bound by the stipulation.

Cases in violation of the revenue laws are in no sense analogous. Such cases are civil causes in the nature of a *qui tam* action, and are prosecuted on the *law* side of the court. By the terms of the statute, they must be brought up to the circuit court by writ of error, and not by appeal.

United States v. 37 *Barrels of Rum*, 1 Woods, 19.
United States v. *Haynes*, 2 McLean, 155.
United States v. *Wonson*, 1 Gall. 5.

The object of the fifth section of the act of congress of July 13, 1861, was not the promotion of any particular branch of agriculture, manufacture or commerce, but solely the reduction of an *enemy;* although that act is an exercise of sovereign power, and in applying it to particular cases, the court enforces a municipal regulation, and not belligerent rights, the court only adopts the particular mode prescribed by the sovereign for its enforcement. That all the people of each state or district in insurrection against the United States are *enemies* until, by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed, is a principle of public law applicable alike to civil and international wars, and has been often announced by this court. The rights of the United States, and their title to the cotton in this case, accrued because cotton had been brought on board the "Rob Roy" from within the territory then holden by their *enemies,* and the judicial decree of its condemnation is conclusive. As to the *cotton* and the decree of *condemnation,* Ames and Butler and all other persons *were* parties to that suit, and were represented in court by the *cotton* which was the subject of the court's jurisdiction, although they were never served with process.

Whether Mansfield complied with the direction of his copartners as to giving the stipulation or release bond in the partnership name, and whether

it was taken by the United States and accepted by the court as *his* stipulation, are immaterial. The demurrers *admit* that the United States ascertained, after process against Mansfield, and the sureties on the stipulation or release bond had been returned wholly unsatisfied, that in truth and in fact Ames, Butler and Mansfield as copartners, owned the cotton prior to its seizure; that Ames and Butler had full knowledge of the suit instituted by the United States to forfeit it; that Ames and Butler directed Mansfield to give a bond or stipulation in the partnership name, to obtain its unlivery; that upon the execution and delivery of such bond, all the copartners obtained possession of the cotton, sold it and received the proceeds.

If there had been *no* averments as to Ames and Butler directing their copartner to give the release bond or stipulation, but simply averments that the cotton was in fact received by all the copartners immediately after it left the marshal's hands, and that all the copartners sold it and received the proceeds, and that all the copartners had knowledge of the suit, the authorities are undisputed that the United States would have a CLAIM against each of the copartners for the value of the cotton at the time it left the marshal's hands, and for interest on that sum; that the *sureties* on the stipulation or release bond could not be held for a greater sum than which they therein bound themselves, if they were proceeded against solely as *sureties*, as they were

in that cause; and that this CLAIM against each of the copartners for the value of the cotton at the time it left the marshal's hands, or, if a *larger* sum than the amount of the value at that time could at any subsequent time have been realized for the cotton, then for such larger sum, with interest, is still in full force.

It is superfluous to say that the case is to be determined precisely as though the war were not at at an end. The war had terminated about five years prior to the *condemnation* of the cotton.

No question as to the regularity of the proceedings in the suit for condemnation — whether as a cause of prize of war or as a cause of forfeiture for violation of the fifth section of the act of July 13, 1861 — arises in this case.

Even if the court that condemned the cotton to the United States has, as a court of admiralty, prize jurisdiction, or jurisdiction as an instance court, to compel, by *monition in personam*, or by an original libel *in personam*, the executors of a person against whom, at the time of his decease, the United States had a claim, on the ground of his having had, sold and received proceeds of property condemned to the United States as prize of war, or for violation of the fifth section of the act of July 13, 1861, with perfect knowledge of the entire cause, and not a *bona fide* purchaser, to bring in those proceeds or the value of the *res* at the time of the unlivery, that court can exercise

such jurisdiction only when the executors are found within its territorial limits, and there served with process.

But the executors in this case are *Massachusetts* executors; their testator was a citizen of Massachusetts. And the Circuit Court for the District of Massachusetts, as a court of chancery, has full jurisdiction over them, as executors, to compel them to discover assets of their testator, and to apply those assets in payment of the amount of the claim that shall be duly proved and determined.

As executors, they are also liable in that court of chancery, because the claim, being entirely independent of the stipulation or release bond, and the decree rendered thereon, and a claim against the partnership, is, in equity, several as well as joint.

As executors, they are liable in that court of chancery, because their testator, together with his copartner Butler, having directed Mansfield to give the release bond or stipulation in the partnership name, for a partnership purpose, and as a partnership act, having then, with his copartners Butler and Mansfield, received the cotton, sold it and received the proceeds, the partnership having paid all the charges on the cotton for storage, the treasury agent, counsel and the expenses attending the defence of the cause, with full knowledge on the part of each copartner, at least *ratified* the giving of the stipulation, although it *was* accepted by

the United States as the individual stipulation of Mansfield.

It appears from the bill, that Mansfield is a resident of Louisiana, and the appellants were not compelled to make him a party defendant. The demurrers are simply that there is no equity shown in the bill. We respectfully submit that the principles applicable to the facts averred in the bill, clearly show that the United States are entitled to a discovery of assets by the executors, and to a decree against them for such amount as shall be duly proved to have been the largest amount that could have been received for the cotton at any time after their testator, together with his copartners, received it from the marshal (less the charges of the treasury agent, &c.), and to five per cent annual interest on that amount, from March 24, 1865, or to other and further relief, consistent with the bill and evidence, and to a priority of payment out of the assets in the executors' hands; and that the demurrers should be overruled.

G. A. SOMERBY,
E. S. MANSFIELD,
Special Counsel for the United States.

SUPREME COURT OF THE UNITED STATES,

No. 133.

THE UNITED STATES,
Appellants,

vs.

OAKES A. AMES & OLIVER AMES, 2D, EXECUTORS OF OAKES AMES, DECEASED, AND PETER BUTLER.

BRIEF FOR EXECUTORS OF OAKES AMES.

GEORGE O. SHATTUCK,
O. W. HOLMES, JR., } *for said Executors.*

Supreme Court of the United States.

IN EQUITY.

THE UNITED STATES, *Appellants*,

vs.

OAKES A. AMES AND OLIVER AMES, 2D, EXECUTORS OF OAKES AMES, DECEASED, AND PETER BUTLER.

BRIEF FOR EXECUTORS OF OAKES AMES.

The material allegations of the bill demurred to are the following: —

That in 1865 the steamboat Rob Roy and cargo of cotton were seized and proceeded against in the Admiralty for a forfeiture as enemies' property. That an individual named Ashael S. Mansfield appeared as claimant of the cotton, and the Court ordered it to be released to him upon his giving a release bond; that he in compliance with said order gave the bond, that the Court approved it and thereupon ordered the cotton to be released to him. That the proceedings ended adversely to the cotton, and judgment was entered in the usual form, declaring the cotton forfeited, and condemning Mansfield and his sureties on the release bond to pay "the sum of $226,946, the value of the cotton seized at the time of its release." That no part of the judgment has been paid. That at the time of the above proceedings the cotton belonged to a firm composed of Oakes Ames, Peter Butler, and the said A. S. Mansfield, doing business under the

style of "A. S. Mansfield," and that the firm directed Mansfield to give the above mentioned release bond in the firm name. There is nothing in any way qualifying the express averments at the beginning of the bill that Mansfield the individual appeared as claimant, that he was ordered to give his individual bond by the Court, and that the bond given, which is his individual bond on its face, was accepted as such by the Court. But notwithstanding the earlier averment that Mansfield executed this bond as his individual bond, the bill continues in the following words: "And upon said bond being executed and delivered by said copartners as obligors under and by their said partnership name and style by said Mansfield, as aforesaid the said copartners obtained possession of the . . . cotton," sold it and received the proceeds. It is then alleged that the United States were ignorant of the alleged partnership until after judgment and execution thereon. But no fraud is charged.

The bill further avers that neither the firm nor Butler have assets sufficient to satisfy the judgment; that Ames died after the judgment was rendered, and left assets sufficient to pay the judgment, but not all debts. No decree is sought against Butler. But it is prayed that these defendants may answer under oath, admit assets sufficient to satisfy and pay said judgment, and may be decreed to pay the amount and costs in that suit, and before paying any other claim against the estate.

It is evident that this is a pretty bold experiment, and the Court will see from the frame of the bill that the pleader felt some uncertainty as to the ground of his prayer for relief.

The defendants say that, apart from other defences the final decree of the Admiralty Court is a bar to this suit. But as the effect of that decree must be considered in different aspects, according to whether the complainants found their claim on the bond or on matters outside of it, and as there are other answers besides the judgment to a claim upon the

bond, and others again to any argument on matters *dehors*, we shall take up the case first on the bond (*First Point*), and then on the alleged receipt and sale of the cotton (*Second Point*). Some further objections to the jurisdiction are stated in the *Third Point*.

First Point.

Considering the claim as based on the bond, the defendants say (**A**) that if Oakes Ames had ever been a party to it, his liability is concluded, both at law and in equity, by the judgment entered upon it, and (**B**), apart from the judgment, that he could not properly have been a party to the bond, and (**C**) that he was not a party to it or in any way bound by it.

A. (1) "When judgment was rendered against Mansfield, the principal, and his sureties, on what is described in the decree and record as the 'release bond,' which was substituted for the cotton which had been seized and libelled in the District Court, the original demand, if it had ever existed against Mansfield, Butler and Ames, as copartners under the name of A. S. Mansfield, passed *in rem judicatam*, and if the United States subsequently discovered that Butler and Ames were partners, and might have been joined in the 'release bond,' or the judgment ordered upon it, it was too late to proceed afterwards against Butler and Ames, who were never severally liable, and who could not be proceeded against jointly with Mansfield, against whom judgment had already been recovered." — *Shepley, J., Record, p.* 21.

Mason v. *Eldred*, 6 Wall. 231.
Wann v. *McNulty*, 2 Gilm. (Ill.) 355.
United States v. *Price*, 9 How. 83, 94.
1 Wms. Saund. 391, *e*.
Beltzhoover v. *The Commonwealth*, 1 Watts, 126.

(2) No ground is shown for equity to adopt any different view, for it is equally well settled that if a party obtains a judgment against certain members only of a firm, when there were other members who were jointly liable, and who might have been held by him, the fact that the plaintiff did not know of the parties not included in his judgment until after it was rendered, gives him no standing in equity.

The plaintiff in such cases has had the benefit of the security with which he was contented, and his ignorance that he might have had more raises no equity in his favor.

Thus, in a case where the plaintiff had recovered a judgment against two only out of four partners on a firm contract, in consequence of the plaintiff's ignorance that the other two (dormant partners) were members of the firm, and now brought a bill in equity to charge the other two on the ground of his previous ignorance, Chancellor Kent said: "The plaintiff has no particular equity entitling him to relief. Ignorance, as Lord Loughborough said, is not mistake." And he dismissed the bill.

Penny v. *Martin*, 4 Johns. Ch. 566.

The same principle has been determined, upon the fullest discussion, by many other cases, both at law and in equity.

Willings v. *Consequa*, Pet. C. C. 301, 306.
Sedam v. *Williams*, 4 McL. 51, 52.
Spear v. *Gillet*, 1 Dev. Eq. 466, 469, top.
Moale v. *Hollins*, 11 Gill & J. (Md.) 11.
Wann v. *McNulty*, 2 Gilm. (Ill.) 355.
Ward v. *Motter*, 2 Rob. (Va.) 536, 545.
Ward v. *Johnson*, 13 Mass. 148.
Anderson v. *Levan*, 1 Watts & S. 334, 339.
Smith v. *Black*, 9 S. & R. 142, 144, 146.
Robertson v. *Smith*, 18 Johns. 459.

And other cases cited and approved in
Mason v. *Eldred*, 6 Wall. 231.

(3) Even if it were distinctly alleged, which it is not, that Oakes Ames at that time resided in another jurisdiction, it would not affect this case. For the bond or stipulation in a proceeding *in rem* takes the place of the *res*, and always authorizes a summary judgment in the cause in which it is given against the parties to it. If, therefore, Ames had been a party to the bond, he might have been made a party to the judgment upon it.

McLellan v. *United States*, 1 Gallison, 227, 230.
Alligator, 1 Gall. 145, 149.

Whether the liability had been equitable or legal, the Court which accepted the bond must also have had complete jurisdiction to fix that liability by judgment. As the Admiralty Court, having that summary and complete jurisdiction, could not now order a judgment against the estate of Oakes Ames, no other Court can do it. On the other hand, if that Court still had the power, no other Court should take jurisdiction until it had done so.

Cf. *Seymour* v. *P. & C. Co.*, 7 Biss. 460, 464.

(4) The cases in which equity has given a remedy to a partnership creditor against the assets of a deceased partner, notwithstanding a judgment, have no application to this case.

It may be true that where there is a partnership debt, joint only in law but joint and several in equity, and a joint security given in respect of such debt, upon which a judgment is taken against the surviving partner, the deceased partner's estate would still remain liable in equity in respect of the original debt; or possibly that such a liability would subsist when a judgment is taken against surviving partners upon a cause of action which was joint only at law, but joint and several in equity, and in which, therefore, the deceased partner having died before that judgment was rendered, could

not have been charged at law. (Lindley on Partnership, 4th Ed. 371.) But these principles would not prevent the judgment being a bar in the present case. For there is no authority for the proposition that a joint judgment upon a bond against three out of four obligors, which was rendered *in the life of the fourth*, and which, therefore, could have been relied on by the fourth as a defence in his lifetime, ceases to be a defence to a suit *upon that bond* in case he afterwards dies. On the contrary, it has been held by this Court in the case of a bond made expressly joint and several, on which a joint judgment was taken, that even a party to the judgment was discharged by death, and that his estate could not be followed in equity.

United States v. *Price*, 9 How. 83.

Mr. Justice Lindley evidently holds the same opinion.

Cf. Lind. Partn., 4th Ed. pp. 451, 452, 371.

This disposes of the whole question, for in this case there was no partnership debt behind the bond. The bond did not, in Mr. Lindley's language, "carry out a pre-existing liability." (Lindley, Partn., 4th Ed. 371.)

The non-intercourse acts only forfeit an offending *res;* they create no personal liability. They do not make guilty individuals liable to a pecuniary debt as the revenue laws do. They do not know guilty individuals; they only know guilty things. There is no allegation in the bill that the defendants' testator was in fault, for his guilt would not affect the case against them any more than his admitted innocence can strengthen the argument in their favor.

Malek Adhel, 2 How. 210, 234.

At the time the bond was given, therefore, the parties to it were subject to absolutely no personal liability, and whatever liability they incurred arose solely from the execution

of the instrument. This point cannot be made clearer than by the simple statement and a reference to the Act of July 13, 1861. (Rev. St., Sect. 5301.) But attention is called to it because a large part of the argument below on the other side went on the assumption that, in some way not explained, the bond was founded on a partnership debt to the United States.

(5) It may be added here, to finish this part of the case, that not only has the *judgment* the same effect in equity as at law, but the liability on the *bond* is no more extensive in one than the other, which, in view of what has been shown, is equivalent to saying that there was no special equitable liability.

For, as, if Ames was subject to any personal liability it arose out of the release bond only, the extent of his obligation must be measured by the terms of the instrument only, the construction of which is the same in equity as at law. This is one of the commonplaces of the books. "If partners enter into a contract binding themselves jointly and not severally, and if such contract is not a mere security for the payment of a debt or for the performance of a joint and several obligation, and if it has not been made joint in form by mistake, the effect of the contract will be in equity as in law to impose a joint obligation and no other." (1 Lindley, Part., 4th Ed. 371, 372, Bk. II, Chap. 2, Sect. 1.) "Where a liability arises from the instrument only, the extent of the obligation must be measured by the terms of the instrument." (*Beresford* v. *Browning*, 1 Ch. D. 30, 37.) "For its construction is the same in equity and at law." (Adams, Eq. 172*.) See esp. *United States* v. *Price*, 9 How. 83, 95.

If, then, Ames was bound by the release bond, he was either bound jointly or jointly and severally with his copartners according to the interpretation of the instrument. If he was bound jointly alone, he is no longer liable, because he is dead, as well as because of the judgment.

Moreover, this would be the true interpretation if he were

bound at all, because the units in the several promises expressed in the bond are (1) A. S. Mansfield as principal (in the singular number); (2) Barker; (3) Jones, etc., *i. e.*, if the alleged firm are parties they are parties as jointly constituting one principal as against the sureties or the obligee, and therefore they promise as one individual or only jointly. It sometimes happens that a part of the obligors in a bond are bound differently in this respect from the rest. See *e. g.*

Nash v. *Fugate*, 24 Gratt. 202, 217.

If, on the other hand, Ames was bound severally as well as jointly with his partners, his executors would remain liable at law, were it not for the judgment, but not in equity. "When an obligee takes a joint and several bond he has nothing to ask of equity; his remedy is wholly at law." (9 How. 95.)

Whatever the liability on the bond, at law or in equity, the Court which took it can declare and enforce if any Court can, and is the proper Court to do it, if any Court is.

B. Ames could not properly have been an obligor on this bond. It is alleged in the bill that Ashael S. Mansfield, the individual, appeared as the sole claimant of the property. There is no allegation in the bill that he did so improperly, and it is clear that his claim was proper on the analogies of admiralty practice. By the twenty-sixth Admiralty Rule, the claimant may be a mere agent, and such agent may claim in his own name. "An agent of absent owners may appear in his own name as agent, or in the names of his principals, as he thinks best."

2 Conk. Adm. 206 (citing *Houseman* v. *Cargo of the North Carolina*, 15 Pet. 40, 49), cf. *ib.* 207, 208.

In the *matter of William Stover*, 1 Curtis, 201, 202, 203, Curtis, J., says: —

"When a third person has thus intervened and claimed, he becomes the *dominus litis*, and is, for many purposes, to

be treated as a party. . . . It is manifest, also, that, ordinarily, he is the only party defendant over whom the Court can have any control; for the reason for admitting an agent to claim, is, that the owner is out of the country, or resides at so great a distance as to render it impracticable for him to appear."

Even if there had been any irregularity in Mansfield's claim, however, it is no longer open to the United States to set it up. No objection to it was made by the United States; he was admitted to be rightly in Court.

United States v. 422 *Casks of Wine*, 1 Pet. 547, 550;
2 Conkling, Adm. Jurisd. 205.

At all events, *de facto*, Mansfield was the sole claimant before the Court, and that being so, by the rules of this Court, in accordance with the well-settled course of admiralty practice, and on the analogy of the statutes applicable to similar cases, no other than he could be principal upon the bond. Had all the alleged facts been disclosed, the United States could not have demanded nor the Court required any other name as principal.

By Admiralty Rule 26 the claimant only is to give stipulation for costs as principal. By Rules 10 and 11 the claimant of goods or ships arrested may have them delivered to him on giving a stipulation with sureties.

"An application for a delivery of the property libelled on bail often accompanies the claim, or is embodied in it. In that case the stipulation is generally framed binding *the claimant* and his sureties to pay the amount which may be decreed and the costs, or to pay the costs and restore the property where restoration may be required."

Dunlap, Adm. R. 177, 178*; cf. *ib.* 175, 176*.
Benedict, Adm. § 495; cf. p. 564.
2 Abb. U. S. Prac. (3d Ed.) Adm. Form 40, p. 382; Form 125, p. 423, etc. etc.
2 Conk. Adm. 584.

By U. S. Rev. St., Sect. 938, the claimant is to give bond to release property seized under the revenue and navigation laws. By the following Sect. 941, in all admiralty proceedings *in rem*, except for forfeiture under the laws of the United States, the claimant is to give a bond or stipulation with surety for the discharge of the property. And the intervening Sect. 940 evidently contemplates that the bond, in cases of seizure for forfeiture, shall be executed in like manner by the claimant.

The Court in this case recognized and followed the practice and the precedents by ordering the claimant to give the bond in question.

C. Next, Ames was not in fact a party to the bond, but the bond was executed as it should have been by the individual "Ashael S. Mansfield," who appeared as claimant.

(1) The bond being set forth and made part of the bill, its legal effect and the extent of the obligation imposed by it cannot be admitted by demurrer, but is a question of law for the Court. (*Dillon* v. *Barnard*, 21 Wall. 430.) Liability on such instruments is governed by the general principles of law and equity. (*Ann Caroline*, 2 Wall. 538, 549; *Harriett*, 1 W. Rob. 182, 192.)

The "*Ashael* S. Mansfield" (not "A. S. Mansfield," the alleged firm name), who binds himself, is the "claimant" of that name. But there is no pretence that the firm appeared as claimants. The only claimant was the individual Ashael S. Mansfield. The obligor describes himself throughout in the singular number as "claimant and owner," and as the "principal" in the bond. The word "owner" does not vary the sense which must be taken to have been intended by the parties, because, whatever the alleged interest of the defendant's testator, it was unknown, and it was only the owner who also appeared as "claimant," that purported to be bound. It is evident, therefore, that the word "owner"

also meant a single person in fact as it does by grammatical construction.

The principal obligor is still further identified by the bond as the person who "*obtained leave of Court to bond said cotton*, and filed a claim thereto." This was the individual Mansfield "now of New River," according to the express allegation of the bill.

The ground for charging an undisclosed principal, or dormant partner, on a simple contract, is, that he is taken to have adopted the name of the agent, or ostensible partner, for the purposes of that transaction. (*Trueman* v. *Loder*, 11 Ad. & El. 589, 595; 2 Sm. L. C. 6th Eng. Ed. 352, 353; 7th Ed. 393, 394.) But every statement of the doctrine shows that it does not apply to contracts under seal. (2 Sm. L. C. 355, 6th ed. 2d column, *Italics*, 7th ed. 397. *Beckham* v. *Drake*, 9 M. & W. 79, 95, 96.)

An instrument under seal must show on its face the parties who are bound by it; and where an individual signs it and uses language purporting to bind him individually, extrinsic evidence cannot be introduced to charge another person as principal by showing that the name of the actual signer is to be taken as the name of somebody else *pro hac vice*.

M'Arille v. *The Irish Iodine Company*, 15 Ir. Com. Law, 146, 153.
1 Lindley on Partnership, 3d Ed. 352.
Dicey on Parties, 229, Rule 48.
Childs v. *Shoemaker*, 1 Wash. 494, 497.

It might be different where plural words of description are employed in the body of the instrument, and the signature imports more than one, as if it were "C. D. & Co." But where, as in this case, the words primarily apply to and are satisfied by the liability of Mansfield alone, no Court, either of law or equity, can look further. To do so in the

present case, it would be necessary not only to add to the written instrument by parol, in a way not allowable by the above authorities, but to contradict it; to show that singular words meant more than one, that "claimant" embraced others not claimants, etc., as shown above.

See authorities cited above.
Pickering's Claim, L. R. 6 Ch. 525.

In *Ward* v. *Motter*, 2 Rob. (Va.) 536, 545, 546, 562, where the business was carried on under the name of R. F., one of the partners, and a firm debt was incurred for which a specialty was given in the name R. F., it was assumed on all hands that there was no remedy against the other partners on the specialty, and held that there was none on the original consideration.

Even if this had been a simple contract in writing, in which the ostensible party was described as "claimant," evidence that another person not named in the instrument was principal would be inadmissible.

Humble v. *Hunter*, 12 Q. B. 310.
Sprigg v. *Bank of Mount Pleasant*, 14 Pet. 201.

A fortiori is this true when the recital to that effect is contained in an instrument under seal. The doctrine applicable to sealed instruments must strictly govern those which are matters of record, and on which a judgment may be entered summarily.

(2) Bonds of this sort cannot be construed to have any more extensive effect than was intended by the Court under whose order they are given. In the language of the plaintiffs' brief in the Court below, "It cannot be regarded as a mere personal security for the benefit of the parties . . . it was a security given to the Court itself." (Benedict Adm. § 490.) Thus it has been adjudged that if by the practice of the Admiralty a bail bond may be discharged, after a technical

forfeiture, by the surrender of the principal, the obligee cannot insist upon payment by the sureties, although entitled to do so by the letter of the obligation.

Lane v. *Townsend*, 1 Ware, 286, 292, 293.

On the same principle this bond, although in form given to the United States, cannot impose any more extensive obligations than were intended by the Court ordering and approving it. But it is alleged in the bill that the Court ordered a bond to be executed by Mansfield, the individual, and approved this bond as the undertaking of Mansfield, the individual, and the intent of the Court is further shown by its judgment, which only condemned Mansfield, the individual, of the three alleged copartners. And as has been shown above, the Court could not properly have done anything else. On this ground, also, therefore, it is manifest that Ames was not a party to the contract.

(3) It is further to be considered that this bond gave the government the benefit of the individual liability of Mansfield. It may well have been that at that time the private security of Mansfield was worth more than that of the alleged firm. Mansfield, moreover, resided within the jurisdiction of the Court, the other two members of the alleged firm did not.

Again, such looseness of construction would jeopardize sureties. They have a right to know who their principal is. In this case it is not alleged that the sureties had knowledge of the alleged partnership, or would have signed any other obligation than that which they actually did; and it is not improbable that the considerations just suggested would have prevented their doing so.

(4) The bond is expressly alleged to have been the bond of the individual Mansfield in the bill at page 4*, where it is set forth that A. S. Mansfield, " now of New River, Louisiana," appeared as claimant and that the Court ordered a release upon his giving bond, and that he did give bond in

compliance with that order. The only direct allegation touching the defendants' testator is that he authorized Mansfield to give a different bond; a mere authority is not enough if not acted on, yet there is no allegation that Mansfield gave or intended to give anything but his personal undertaking. There is one deceptive phrase implying a different notion, but it is not an allegation and what it implies could not have been alleged, as is shown by what has just been quoted from the express statements in the bill as well as by the ordinary and proper course of procedure already set forth in the brief. The phrase referred to is as follows: "*Upon* the said bond being executed, etc., by said copartners as obligors, the said copartners obtained possession," etc. (Page 7*, top page 3.)

Second Point.

This suit cannot be supported on the ground that the cotton went into the hands of the alleged firm and was sold by them. There are several considerations, each of which seems conclusive on this point. First (**A**), that the matter is *res adjudicata* and the cotton released by the terms of the Admiralty decree, and further that after the final decree against the bondsmen the lien on the cotton was so conclusively discharged, that even the Admiralty Court could not have rearrested the cotton. Next (**B**), that the forfeiture of the offending thing created by the act does not extend to proceeds which are not mentioned. Finally (**C**), that in any event it is not a case in which a Court of Equity will interfere.

A. If the *res* itself, the cotton, had been within reach of the process of the Court in Louisiana at the time of bringing this suit, it would not have been within the power of the Court to order the arrest. When the *res* has been released on a bond to pay its money value, it is familiar practice that "if the suit be prosecuted to a sentence or final decree, the lien

is removed altogether, the satisfaction of it being transferred to the bail."

Coote, Adm. Pr. (2d Ed.) 19. Boyd, Adm. 39.
Wms. & Bruce, 228. Roscoe, Adm. 6, 112.
Union, 4 Blatchf. 90.
White Squall, 4 Blatchf. 103.
T. P. Leathers, Newberry, 432, 433, 435, 437, note.
Thales, 3 Ben. 327, 329; s. c. 10 Blatchf. 203.
Jack Jewett, 2 Ben. 353, 355, 356.
Old Concord, 1 Brown, Adm. 270.
Kalamazoo, 15 Jur. 885; 9 Eng. L. & Eq., 557.
Wild Ranger, Br. & Lush. 84, 87, 88.
Hero, 13 W. R. 927; Br. & L. 447.
Steamer Webb, 14 Wall. 406, 418.
Ann Caroline, 2 Wall. 538, 549.
Lady Pike, 96 U. S. 461, 465.
Virgo, 13 Blatchf. 255.

Some of the above cases go much further, and lay down that the bond becomes the substitute for the thing from the moment it is filed, so that even while the cause is pending in Court, the vessel or other *res* cannot be rearrested, except of course in cases where the bail was not rightfully taken, and the like, or where the release was *ultra vires* of the Court or its officers. It is not necessary for the defendants to go so far, although if it were the argument would be strong, not only on authority but from the language of the statutes. In ordinary instance causes *in rem* the claimant has the right by Rev. Stat., Sect. 941, as well to prevent an arrest by giving bond as to obtain a release at a later stage by the same means, if the vessel has been arrested. If the *res* has never been seized, the Court has no jurisdiction to affect it; and it will scarcely be maintained that the jurisdiction is intended by the law to vary according to the accident of the bond's being given a little later or a little earlier. It is true that

forfeiture cases are excepted from this section, but property seized for a forfeiture can be released by a bond in the usual form after seizure, and when the bond is allowed to be given it has of course the same effect as the same bond in another cause, similar in all respects except the cause of action.

We may go further and ask what object or inducement could a claimant have to release *cotton* at the cost of binding himself personally for its value, unless to obtain the liberty to sell it. If the claimant, when bail has been rightfully taken, does not hold for his own benefit, why does he not give bond to restore, in the well-known Admiralty form, instead of a bond to pay?

But suppose the Admiralty Court could have ordered the rearrest of the cotton after the bond was given, it did not do so. It made no order looking towards the application of the cotton *in specie* to satisfaction of the forfeiture, but on the contrary proceeded to a final decree in the usual form, that the bondsmen on what is called "the release bond," should pay the money value of the cotton "at the time of its *release*." Not only do these words evidently contemplate the cotton as still released, but the decree in which they are contained shows that the fund and the only fund which the Court ordered to be applied to satisfy the forfeiture was that which the bondsmen should bring in. This being so, no other Court can follow either *res* or proceeds further than the Admiralty Court attempted to follow them. One of the points which the Admiralty suit was to decide, and over which the Admiralty Court exercised exclusive and final jurisdiction, was whether that cotton should be sold or go free. Unless and until it said "Sell it, and let the United States receive the proceeds," no other Court could say so. The question of applying the cotton or its proceeds to the forfeiture is not only *res judicata*, but one over which no other Court could ever have any jurisdiction.

We do not suppose that we shall be called on to meet an

argument attributing any effect on the cotton to the interlocutory order declaring it forfeited. It would be sufficiently shown that no such effect was intended by the immediately following condemnation of the bondsmen. But further, the Court is aware that this is a very common, if not the universal form of decree at that stage of the case, whether satisfaction is to be obtained by a sale of the *res* or from the parties to a release bond, and in other ordinary admiralty causes *in rem* as well as in forfeiture cases. In a cause of damage to cargo, for instance, where a bond had been given before arrest, a similar decree would be made, yet of course the judgment could not affect the *status* of the vessel. (Cf. 2 Abbott's U. S. Practice, 3d Ed. pp. 425, 426, and *ib.* 437, 438.) So, it is supposed, if a fund had been deposited in the registry under Rules 10 or 11. In all these cases the *res* is declared forfeited simply to lay a foundation for a final decree against the bondsmen by establishing that the case for payment exists. (No other form is known in Massachusetts.)

McLellan v. *United States*, 1 Gall. 227, 230.
Dunlap Adm. 297, 299*; 2d Ed. 257, 258.

It will not be maintained that in every case where the libellant prevails, although the property has been released by order of Court, and judgment taken against the bondsmen, every purchaser of the released property is guilty of a conversion until the bondsmen have paid. The bill does not charge the sale of the cotton as wrongful, but apparently relies, as did the argument below, on the receipt of proceeds as the important circumstance, and as founding an equitable jurisdiction analogous to that of prize courts, to be mentioned directly. The plaintiffs seem to forget that the decree of condemnation of prize in the cases next cited was to be followed by a return of the prize into Court and a distribution of the *res* instead of the payment of a money bond, as here.

But with reference to this view there are further distinctions to be noticed.

These proceedings belonged to the instance side of the Admiralty Court (*United States* v. *Weed*, 5 Wall. 62, 67, 72), and after the foregoing argument it is hardly necessary to consider the rules of the prize court. But no principle will be found, even in prize causes, which conflicts with the defendants' case. It has been said that "*pending the suit* in the prize court, the ship and goods are in the custody of the Court" (2 H. Bl. 541), and that the property is held by the parties to whom it is delivered "as agents of the Court, and not in right of property" (Sir Wm. Scott in 3 T. R. 329). So when the vessel and cargo are sold by order of Court "before final sentence," the power has been asserted to monish the purchaser to pay in the proceeds. (*Herkimer*, Stewart, 128.) But the argument has never been put higher than that "the power subsists after a general adjudication [*i. e.*, a decree of *condemnation*] until all claims respecting the prize [*e. g.*, of captors *inter sese*, of neutrals, etc.] are determined"; and this argument has been put exactly on the ground that the decree of condemnation was not the final decree in the sense which would put an end to the jurisdiction, because the litigation was not at end. (Sir Wm. Scott in *Smart* v. *Wolff*, 3 T. R. 323, 331.) These doctrines do not touch the present argument, even if not peculiar to prize law, as seems to be implied in the *Two Friends*, 1 Rob. 271, 284, and by Judge Story, except "if the bail be not rightfully taken." (*Struggle*, 1 Gall. 476, 478.)

A question, we will not say like the present, but such as would have been presented if the Admiralty Court, at the date when this suit was begun, had undertaken to issue a monition against holders of the cotton or its proceeds, was never raised in a prize court. It could not very well have been, seeing that the stipulation of prize bail has been, not a money bond, but for the return of the property.

(Upton Mar., Warfare and Prize, 2d Ed. 432; cf. allegations 3 T. R. 324.)

B. Supposing the vessel to have been released and the plaintiffs to have sought a monition in the proper Admiralty jurisdiction against proceeds before it was too late: the defendants say that even then it must have been refused. The law in question creates a "forfeiture" of a specific thing in terms, and does no more. It is penal in its nature and should not therefore be extended to forfeit proceeds of the forfeited thing which are not mentioned in the Act.

United States v. *Weed*, 5 Wall. 62, 68.
Reform, 3 Wall. 617, 629.
United States v. *The Malek Adhel*, 2 How. 210, 235.
United States v. *Huckabee*, 16 Wall. 414, 431.

C. Even if the whole argument so far were erroneous, a case would not be made out for equity to interfere. In the first place, equity never lends its aid to enforce a forfeiture, and the law in question creates a forfeiture in terms.

Stevens v. *Gladding*, 17 How. 443, 453–455.
Story Eq. Pl. § 521.
Story Eq. §§ 1391, 1494.
Cf. *United States* v. *McRae*, L. R. 4 Eq. 327, 338 *et seq.*

In the next place, the complainant is in this dilemma: If the Admiralty Court had had power to order the cotton to be appropriated to satisfaction of the forfeiture, and had done so, but the cotton or its proceeds were where the process of the Court did not run, the proper and adequate method of carrying out such order would have been by monition from such other Admiralty Court as could reach the *res*.

Dunlap, Adm. 47* (2d Ed. 63).

And when the admiralty has full powers, equity will not interfere, as indeed it was never known to in aid of admiralty proceedings.

master's office, and the executor there sets forth the amount of debts entitled to priority, etc. (3 Atk. 572; 2 Cox, 44.)

According to Chancellor Kent, the decree is a judgment for all creditors, and all creditors are permitted to come in under it.

Thompson v. *Brown*, 4 Johns. Ch. 619, 638, *et seq.*

It has been thought in some cases that the mere existence of a debt was not enough to give equitable jurisdiction in this country.

Wilkins v. *Finch*, Phillips' Eq. (N. C.) 355.
M'Kay v. *Green*, 3 Johns. Ch. 56.

And the English courts have found it hard to give a satisfactory account of the jurisdiction even there, notwithstanding the defective powers of other courts.

But here the question is not whether an English or a State court of equity would take jurisdiction in an analogous case, but whether the United States Court will. As has just been shown, to do so would be to take upon itself the administration of the estate, notwithstanding the full provisions of the local law, and, what is more important, it would assume this burden in the present case without anything gained by it. No single benefit can be named, either of equitable doctrine or the machinery of equity courts, which would be gained in such a suit. In this instance the plaintiffs say: We have a liquidated claim, so that there is no need of equitable aid to ascertain the amount. We have a statutory title, by the laws of the United States, to preference over all creditors whatsoever, so that not only do we not depend on marshalling for our place relatively to other creditors, but our claim is paramount to all marshalling; and if there is anything of the sort to be done in this cause, it is merely a supplemental burden incident to the nature of

the only equitable procedure under which we can claim. We do not pray for it, nor for an account of any sort.

The plaintiffs do not stop there, for they allege a claim enforceable at common law if anywhere, in tort or contract, as it may be put, or in the admiralty by monition. If there be a case for which Rev. Stat., Sect. 723, has a meaning, it is this; for the remedy at law is plain, adequate and complete.

C. In whatever aspect this bill is regarded, it is in substance a bill to enforce a forfeiture, which, as it has been said, equity never does.

G. O. SHATTUCK,
O. W. HOLMES, JR.,
For Executors of Oakes Ames.